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CONVEYANCER'S NOTEBOOK

REPORT ON H.M. LAND REGISTRY FOR 1953–54

The Chief Land Registrar's annual report to the Lord Chancellor on H.M. Land Registry for the year 1953–54 (H.M. Stationery Office, price 1s. 6d., an increase of 50 per cent. over the previous year) contains nothing momentous. The time taken to deal with registrations is the worst since 1949—and the position seems to have got even worse since the period covered by the report—due, apparently, principally to the work provided by Surrey. Nevertheless, voluntary registration has become more popular despite the fact that it is treated by the Registry as a bit of a nuisance. As compulsory registration spreads might not the Registry be more efficient if district registries were established? We would have thought that Yorkshire was ripe for a takeover bid and for a district registry. It was indicated in Parliament recently that the Land Registry is not to be removed from London on the ground that it serves as a district registry for London and the Home Counties, which may indicate the intention to establish district registries.

We are pleased to note that much fuller particulars of easements are being provided, but restrictive covenants are still inadequately dealt with. For the charges register merely to state that restrictive covenants are imposed by such-and-such a deed is unsatisfactory, as it is by no means clear exactly what parts of the deed are incorporated in the title.

The cost per transaction has risen over the previous year by no less than 4s. 2d. to 23s. 11d., but nevertheless there was a surplus of £124,000 out of a total fee income of £744,000. Part of the expenditure included the installation of a new automatic

lift but, as the lift always appears to be at the top of the building because someone has failed to close the gates, its utility is not as great as it might be.

Although the Registry is not perfect we think that it is entitled to some praise instead of the usual brickbats. Once land has been registered the landowner receives benefits far outweighing the minor defects attending registration of title. For example, 5s. is a small enough fee to pay to have the form of a transfer approved—we do not intend this as an encouragement to increase the fee. A real hardship does, however, occur on first registration. In addition to the usual unregistered land costs, the purchaser has to pay the costs and Land Registry fees on first registration. Is there no way in which these items could be reduced or eliminated? Why should not the solicitor's scale fee include the cost of registration? And the Registry could eliminate the fees on first registration by adjusting, if necessary, the other fees. A solicitor, at present, is reluctant to advise voluntary registration, not because he will be paid a lower fee on a subsequent sale, but because of the extra cost to his client.

Discharge or Modification of Restrictive Covenants—Costs of Applications

In *Re Jackman's Application* [1954] J.P.L. 458, the Chairman of the Lands Tribunal made a general statement with regard to costs of application under the Law of Property Act, 1925, s. 84, to have restrictive covenants discharged or modified. Pointing out that such applications differ from legal actions and that objectors are in a different position from defendants, he said: "Generally speaking, the Tribunal is not inclined to award costs against objectors unless the objections are frivolous, vexatious, or may be regarded as an abuse of the due process of law. The applicant is asking for a very special privilege. He probably hopes to gain very materially by it, otherwise he would not make the application, and I think therefore that he must bear himself any costs for taking the steps necessary to convince the Tribunal that the restrictive covenant should be removed."

Atomic Energy Authority Act, 1954

By this Act the United Kingdom Atomic Energy Authority was established as a body corporate with power to hold land without licence in mortmain. By section 5, the Lord President of the Council may authorise the Authority to purchase land compulsorily and the Acquisition of Land (Authorisation Procedure) Act, 1946,

applies as if the Authority were a local authority within the meaning of that Act. The power of compulsory purchase covers the purchase of a right to place a pipe across land, whether above or below ground, and to use, repair and maintain the pipe, without purchasing any other interest in the land. It may be noted that this right applies to all land and there is no exclusion of gardens and pleasure grounds as in the case of the corresponding power under the Electricity Supply Acts. The Authority is also given power to lay pipes in highways and to open and break up highways for the purpose of laying, repairing and maintaining pipes.

By section 5 (3) the Authority are placed under an absolute duty to secure that no ionising radiations from anything on any premises occupied by them, or from any waste discharged from their premises, cause any hurt to any person or any damage to property, whether he or it is on such premises or elsewhere.

Law Reform (Enforcement of Contracts) Act, 1954

This Act repeals the famous section 4 of the Statute of Frauds except in respect of guarantees, that is, the following three types of contract need no longer be evidenced in writing: (i) a contract by a personal representative to answer damages out of his own estate; (ii) a contract in consideration of marriage; and (iii) a contract not to be performed within a year. Secondly, section 4 of the Sale of Goods Act, 1893, is repealed. Section 40 of the Law of Property Act, 1925, remains unaffected. In *Craxfords (Ramsgate), Ltd.* v. *Williams and Steer*, *The Times*, July 28, section 4 of the Sale of Goods Act made what is expected to be its final appearance on any English stage, when it was held that the new Act is retrospective and applies to pending actions.

Law Reform (Limitation of Acts, etc.) Act, 1954

This Act makes a number of alterations in the law relating to limitation of actions. First, the Public Authorities Protection Act, 1893, as amended by the Limitation Act, 1939, s. 21, is repealed *in toto*; and with it go the numerous special limitation periods in favour of the armed forces and nationalised industries (section 1). Secondly, as a sort of *quid pro quo*, the ordinary six-year limitation period is in the case of actions for personal injuries cut down to three years, whether the cause of action lies in contract or in tort. If the wrong caused damage both to the person and to property the action is not barred so far as the damage to the property is concerned (section 2). Thirdly, the twelve-months' period under the Fatal Accidents Act, 1846, is increased to three years (section 3).

Fourthly the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, is amended. It will be recollected that where a cause of action in tort survived under that Act against the estate of the wrongdoer one of two conditions had to be complied with : either (i) proceedings were pending at the date of death ; or (ii) the cause of action arose within six months of the death and proceedings were taken within six months of the grant of representation. This second alternative has been amended by deleting the first requirement, *i.e.*, it will no longer be necessary to prove that the cause of action arose within six months of the death but proceedings must still be taken within six months of the grant of representation.

AGRICULTURE (MISCELLANEOUS PROVISIONS) ACT, 1954

This Act makes a number of alterations with regard to Agricultural Land Tribunals. By section 4 and Schedule I, which will come into force on a day to be appointed, the two nominated members of a Tribunal will be nominated by the chairman of the Tribunal from panels drawn up by the Lord Chancellor. By section 5, a tribunal may order costs against a party to a reference to it (including any Minister or Government Department) where it appears to the Tribunal that the party has acted frivolously, vexatiously or oppressively. The costs may either be fixed by the tribunal or may be ordered to be taxed by a county court, and may be enforced by execution issuing out of the county court. By section 6, which will come into force on a day to be appointed, a tribunal may, at the request of any party to the proceedings, refer any question of law to the High Court ; and, if the tribunal declines to do so, any person aggrieved may apply to the High Court for an order compelling it to do so. The Minister of Agriculture and Fisheries is entitled to be heard on any such reference.

Section 7 amends the Agricultural Holdings Act, 1948, s. 24 (2) (g). Under the latter section a notice to quit an agricultural holding given within three months of the death of a tenant of an agricultural holding does not require the consent of the Minister. The new section provides that, where there are joint tenants, the reference to the tenant in section 24 (2) (g) shall be to the surviving or last surviving joint tenant. This alters the law as laid down in *Woodward* v. *Earl of Dudley* [1954] 1 W.L.R. 476 (noted *ante*, p. 194).

Section 3 amends the law with regard to smallholdings which are governed by Part IV of the Agriculture Act, 1947. In general, for the future, smallholdings will cease to include holdings exceeding fifty acres save in very exceptional cases.

DISTRIBUTION OF INTERESTS SAVED FROM LAPSE BY THE WILLS ACT

By Spencer G. Maurice, Barrister-at-Law

As is well known, section 33 of the Wills Act, 1837, saves from lapse devises and bequests given by a testator to any chid or remoter issue who dies in the lifetime of the testator, himself leaving issue, if any such issue is alive at the time of the testator's death. It is provided that in such case the gift " shall take effect as if the death of such [issue of the testator] had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." Examination of the section readily reveals certain prerequisites to the exception taking effect, as follows:—

1. The gift must be to issue, but it does not matter how remote that issue is.

2. That issue must die leaving issue, but again the degree of remoteness does not matter. Hence in a case of exceptional longevity a great-great-grandson might under the rule receive a benefit under his great-great-grandfather's will, since the latter might make a bequest to a grandson who predeceased him leaving no issue less remote than his own grandson. It is, however, a matter of some doubt whether the *same* issue must be living both at the death of the donee and of the testator. In this respect the effect of section 33 in saving a gift from lapse is perhaps different from that of section 32 which preserves from lapse a devise of an estate tail (and now by virtue of section 130 (1) of the Law of Property Act, 1925, a bequest of personalty in tail contained in a will coming into operation after 1925), where there is, at the testator's death, issue who can inherit under the entail: see Jarman on *Wills*, 8th ed., pp. 462 *et seq.*, and Theobald on *Wills*, 10th ed., pp. 558 *et seq.*, and the cases there cited.

3. It is not enough for issue of the deceased legatee to be born in the testator's lifetime. That issue must survive the testator.

4. It is enough if issue of the legatee survives the testator, even though that issue subsequently dies before reaching the age of 21 and so without receiving the benefit of the gift. (Even if the issue reaches full age, he will not necessarily receive any benefit, for the legatee may have made a will under which the property passes to others.)

5. It is always open to the testator specifically to exclude the operation of the exception.

What is not so readily apparent is the construction to be placed upon the words of the section quoted above. Is the sole object of the section to give effect to the gift in the testator's will and prevent lapse, without affecting or altering the administration of the estate of the donee by imputing to that person an artificial date of death? Or is the donee to be considered for all purposes as having survived the testator? These two views of construction, called the "narrow view" and the "wide view" respectively, were considered by Upjohn J. in the recent case of *Re Basioli, Re Depaoli, McGahey* v. *Depaoli and Others* [1953] Ch. 367; [1953] 1 All E.R. 301. The facts of that case illustrate the difference in result according to the view adopted.

The testatrix, Mrs. Depaoli, by her will made in 1923 gave to her four children certain real and personal property. One of these, Mrs. Basioli, died in 1929, intestate, survived by her husband (Mr. Basioli) and a son. Mr. Basioli died in 1939. The son died in 1949, not having attained the age of 21 years. Mrs. Depaoli died in 1940, and was therefore survived by her grandson. Her husband (Mr. Depaoli) had died in 1937. Since Mrs. Basioli's son had survived his grandmother, the testatrix, it was clear that her gift to her daughter was saved from lapse by section 33. But as the testatrix's grandson had died under the age of 21 years, and therefore never obtained a vested interest in the property the subject of the gift, the question to be decided was, who was entitled to it.

If the narrow view were to be adopted, it was necessary to consider who was entitled to Mrs. Basioli's estate on her death intestate in 1929. At that time her husband (Mr. Basioli) and her father (Mr. Depaoli) were alive, as well, of course, as her mother (the testatrix). Accordingly, on the death of the testatrix, the estate of Mr. Basioli, as the surviving spouse of the deceased legatee, would, under section 46 of the Administration of Estates Act, 1925, be entitled to £1,000 and interest thereon, less such amount as he had already received out of his deceased wife's estate, while the balance would be divisible between the estates of the testatrix herself and her husband (Mr. Depaoli), as the parents of the deceased legatee, in equal shares. If the wide view were to be adopted, it would be necessary to consider who, under section 46, would have been entitled to Mrs. Basioli's estate had she in fact died immediately after the testatrix in 1940. At that time, not only was the testatrix herself (Mrs. Basioli's mother) dead, but also Mrs. Basioli's husband and her father. Her son was still alive, and, had he

survived till the age of 21 years, he would, of course, have received the whole of the gift—obviously, had he, or issue of his, reached full age, the problem would never have arisen—but as he died before that age without issue, he could be left out of account. Accordingly, the persons who would have been entitled under section 46 would have been the brother and two sisters of Mrs. Basioli.

Upjohn J. held that the narrow view was the correct one, and that therefore the estates of Mr. Basioli and of Mr. and Mrs. Depaoli benefited. With respect, it seems that he was clearly right, though as the cases which he considered showed, the court has on occasion adopted the wide view. In reaching his decision his Lordship applied *Re Hurd, Re Curry, Stott* v. *Stott* [1941] Ch. 196, a decision of Farwell J. but he also found support in certain earlier cases. As those cases apparently were not put to Farwell J. it will be convenient to consider the *ratio decidendi* of *Re Hurd* first. Having stated that the effect of section 33 of the Wills Act was to prevent lapse in the case before him, by the fiction that the legatee survived the testatrix, the learned judge pointed out that the gift none the less became a part of the beneficiary's estate, and illustrated the awkward consequences which might arise if that part of the estate were to be administered otherwise than in accordance with the law as it was at the true date of death by supposing the case of a child who had died before 1926, and whose estate subsequently benefited under the will of one of his parents, who died after 1925: if he died intestate, there might be two sets of next-of-kin. Furthermore, as Upjohn J. pointed out in *Re Basioli*, if the wide view be adopted, then if a child left a will, there might be two classes of residuary legatees, one class at the date of his real death, and quite a different class at the date of his notional or fictitious death. ". . . The Act does not," said Farwell J. [1941] Ch. 197, " in my judgment, apply so as to alter the way in which the existing estate should be disposed of. It only operates so as to increase that estate, and does not change the persons who were entitled to the estate under the law which was in force at the time of the intestate's death." The words quoted suggest that Farwell J. went so far as to consider whether the devolution of the whole of the deceased's estate might not be altered by the accretion to it of the gift of the testatrix: with respect, this could hardly happen on any construction of the section, which only refers to the devise or bequest which is to be saved from lapse.

The earliest authority from which Upjohn J. drew support for the narrow view is that of *Pearce* v. *Graham* (1863) 31 L.J.Ch. 359, where Sir Richard Kindersley V.-C. was concerned with a legacy

given by the testator to his daughter, who predeceased him, survived by her husband and issue. A settlement made on the daughter's marriage contained a covenant to settle all property coming to her or to her husband in her right during the coverture, and the question was whether or not the fictitious survivorship created by section 33 meant that the legacy was acquired during the coverture within the meaning of the covenant and accordingly bound by the settlement. After pointing out that the legacy formed part of the assets of the legatee, so as to be subject to the legatee's debts or contracts, the learned Vice-Chancellor gave it as his opinion that, for the purposes of the covenant, it did not come to or become vested in the legatee whilst the coverture lasted. He continued (at p. 360) : " The effect of section 33 of the Wills Act was simply to prolong her life by a fiction for a particular purpose, namely, that the legacy might not lapse, but certainly not for any other purpose; whereas the covenant applies to the actual coverture; and even therefore if the Act had prolonged the coverture, it would have been a fictitious one only, and not an actual one within the terms of the covenant." Upjohn J. in *Re Basioli*, treated the remarks of Sir Richard Kindersley V.-C. on the effect of section 33 as *obiter*, but nevertheless as a clear expression of opinion which supported the narrow view.

It is submitted that, athough *Pearce* v. *Graham* supports the narrow view (and it was only in this connection that it was germane to *Re Basioli*), the conclusion to which Sir Richard Kindersley V.-C. came is open to question, and not reconcilable with certain remarks of Stirling L.J. in the Court of Appeal in *Re Scott* [1901] 1 K.B. 228, another case from which Upjohn J. drew support for the narrow view. Considering the effect of section 33, the learned Lord Justice said ([1901] 1 K.B. 239) : " The legislature has simply provided that in certain cases there shall be a posthumous addition to the property of a deceased person, the object of such provision being to place that additional property at the disposal of the deceased while still living. At this point, in my judgment, the operation of the Wills Act ceases; and this additional property is left to go and devolve as part of the property of the deceased child. If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property

will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustees in bankruptcy, and so on."

While it is clear that both Sir Richard Kindersley V.-C. and Stirling L.J. took the view that section 33 had the effect of prolonging the life of the legatee only for the purpose of preventing lapse, they do not appear to have had exactly similar views on the time at which the legacy was to be considered part of the legatee's estate, though both considered that it would be subject to the deceased's debts and contracts. It is difficult to see why the legacy should be dated back to the legatee's death as an asset available for the payment of debts, but not as after-acquired property subject to a covenant in a marriage settlement. With respect, did not the learned Vice-Chancellor make the mistake of assuming that, for the legacy to be brought within the ambit of the covenant in a marriage settlement, the coverture of the legatee must be extended till after the death of the testator, and fail to appreciate that a necessary consequence of the legacy going to swell the assets of the legatee was that it must be deemed to have been received by her during her lifetime, and hence, since her husband survived her, during the coverture? Stirling L.J. was not, as Sir Richard Kindersley V.-C. was, concerned with a covenant in a marriage settlement, and in referring to such a settlement did so purely by way of illustration, but it is submitted, nevertheless, that the remarks of the learned Lord Justice indicate the true position, and that a legacy is liable to be brought into settlement.

Reference must also be made to *Re Hone's Trusts* (1883) 22 Ch.D. 663, where the testator directed that a share of his estate which he gave to his daughter in the event of her surviving him should be deemed and taken to be part of the funds comprised in her marriage settlement. In fact she predeceased the testator leaving issue who survived the testator so that section 33 came into play, and Pearson J. held that as the daughter was to be taken as having survived the testator the clause of the will came into effect so that the gift should be settled : since the daughter's life was prolonged so that the legacy might not lapse, the trust attached to the legacy went with it.

Re Hone's Trusts is clearly distinguishable from *Pearce* v. *Graham*—as Pearson J. indicated in the course of counsel's argument—because the settlement of the gift depended upon the testator's will and not upon a covenant in the beneficiary's marriage settlement, so that it cannot be said either to uphold or rebut the submission that a gift saved from lapse will be affected by a clause

in a settlement bringing in after-acquired property, but that submission is supported by the decision of Farwell J. in *Re Hurd* that the Act ". . . only operates so as to increase [the deceased legatee's] estate, and does not change the persons who were entitled to the estate under the law which was in force at the time of the [deceased's] death." Furthermore, in *Pickersgill* v. *Rodger* (1876) 5 Ch.D. 163, a case to which Upjohn J. referred in support of the narrow view, Sir George Jessel M.R. said (at p. 172) that by virtue of section 33 ". . . The subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it." If the gift can be disposed of by will, there appears to be no logical reason why it should not also be dealt with by a settlement *inter vivos* such as a marriage settlement.

Another case from which Upjohn J. drew support for the narrow view was *Re Hensler*, *Jones* v. *Hensler* (1881) 19 Ch.D. 612, a decision of Sir Charles Hall V.-C. There a father devised a freehold house to his son, who predeceased him, leaving issue who were living at the father's death, and having by his will devised all his realty to his father. The learned Vice-Chancellor held that the freehold house passed to the son, but that the devise by the son failed. Upjohn J. took the view that this decision could be supported on the ground that it was impossible to treat the son as surviving the father and at the same time to treat the father as surviving the son for the purpose of benefiting under his will. He thought that it was clear from the judgment of Sir Charles Hall V.-C. that he would have held that a gift by the son in appropriate terms to a person other than his father would have carried the father's gift, even though that person, while surviving the son, predeceased the father, and that the father alone was to be treated as being under a special disability. The opinion of Upjohn J. of this case is of particular interest because, as he acknowledged, there are two schools of thought as to which view—the narrow or the wide—it supports.

It is unnecessary to consider here the facts of *In b. Councell* (1871) L.R. 2 P. & D. 314, a decision of Lord Penzance, and *Re Allen's Trusts* [1909] W.N. 181, a decision of Neville J., to which Upjohn J., in his judgment in *Re Basioli*, referred as cases supporting the wide view, because, as his lordship pointed out, it is clear that in neither case was the matter argued before the court and they are, therefore, not satisfactory decisions. In the light of Upjohn J.'s decision to adopt the narrow view it seems clear that *In b. Councell* and *Re Allen's Trusts* can no longer be regarded as good law.

PARTY WALLS IN LONDON

By Desmond Wright, Barrister-at-Law

Introductory

The conveyancer of property in the London area will often be faced with the consideration of the rights of the purchaser and the rights of the owner of adjoining properties in relation to the building, strengthening, maintenance and use of walls and structures built or to be built over or adjoining the junction line of the property to be purchased with adjoining properties. The purchaser of property for redevelopment will often be particularly interested in his rights and obligations in regard to this matter, and the following review of the law peculiar to party walls in London is designed to assist the conveyancer in the problems which may arise.

Although the common law contains a considerable amount of authority on the subject of party walls and walls between adjoining owners, it was found to be deficient when dealing with a closely built up area such as London. Ever since 1667, the year after the Great Fire, the buildings of London have been strictly controlled by a long sequence of public and private Acts of Parliament, and the construction of party walls and the rights of adjoining owners in relation to them are now codified in the London Building Acts, 1930–39, and in particular the London Building Acts (Amendment) Act, 1939 (herein called "the 1939 Act"). London, for the purposes of this legislation, consists of the City, together with the twenty-eight Metropolitan Boroughs set out in the First Schedule to the London Government Act, 1939.

Meaning of Party Wall, Party Fence Wall and Party Structure

At common law the term party wall has various meanings: it might mean a wall notionally divided down the middle, each adjoining owner owning part of the wall, or it might mean a wall the property of one adjoining owner but subject to a right in the neighbouring owner to have it maintained as a dividing wall. Before 1926 a party wall might be owned by two neighbours as tenants in common, but since section 38 of the Law of Property Act, 1925, came into force such a wall is deemed to be severed vertically as between the respective owners and the owner of each part has rights of support and user over the other part. Section 44 of the 1939 Act, however, defines a party wall as meaning:—

(i) a wall which forms part of a building and stands on lands of different owners to a greater extent than the projection of any artificially formed support on which the wall rests; and

(ii) so much of a wall, not being a wall referred to in the foregoing paragraph (i), as separate buildings belonging to different owners.

It is clear therefore that under (ii) a wall may be a party wall even although it stands entirely on one person's land, providing that it separates buildings belonging to different owners. A wall standing over a junction line between two owners, even although built onto on one side only is a party wall as in the case of a vacant site with, on the adjacent site, a building supported by a wall standing over the junction line between the two sites; but if that supporting wall be wholly on the adjacent site then it is not a party wall. Thus a wall standing on A's land may be a party wall over one part of its length, where it is built onto on A's side and on his neighbour B's side, and a private wall over another part of its length where built onto on A's side only or on B's side only. In *Knight* v. *Pursell* (1879) 11 Ch.D. 412, a boundary wall, together with some closets standing against it, stood entirely upon the plaintiff's land. As such the wall was not a party wall, but the defendant built a building against it after which that part of the wall which separated adjoining buildings was held to be a party wall.

Thus, in determining whether a wall is a party wall under the London Building Acts, it is not necessary to consider the ownership of the wall but rather its position and use, whereas at common law it is necessary to consider the interests of the occupiers in the wall in question.

A party wall under the 1939 Act is essentially a wall forming part of a building; but there are other boundaries between adjoining owners or occupiers which are dealt with by the 1939 Act. A dividing wall standing on lands of different owners and forming no part of any building is known as a " party fence wall," although a boundary wall standing entirely on the land of one owner, even though its foundations stand on the neighbour's land, is not a party fence wall (1939 Act, s. 4 (1)).

A party wall must be a vertical structure: *Reading* v. *Barnard* (1827) 1 Moo. & Malk. 71. Consequently, where there is a horizontal division between neighbours, as in the case of rooms intermixed, the floor or ceiling is not a party wall. The 1939 Act uses a term which will include divisions in either the vertical or the horizontal plane, namely " party structure." By section 4, the term " party structure " includes both a party wall and also a floor,

partition or other structure separating buildings or parts of buildings approached solely by separate staircases or separate entrances from without. Thus a " flying freehold " consisting of one room intermixed with a neighbour's rooms, might have as many as three walls, a ceiling and a floor all party structures.

Construction of Party Walls

There are extensive provisions in the Acts and in the by-laws made under them regulating the construction of party walls when they separate adjoining buildings belonging to different owners. By section 16 of the 1939 Act an external wall or part thereof is not to be used as a party wall unless it conforms as a party wall with the requirements of these Acts and by-laws. Nor by section 17 is any alteration to be made to a party wall unless it is made in accordance with the Acts and by-laws or with the consent of the London County Council. Section 138 provides that where any party wall or external wall which does not comply with the provisions of the London Building Acts is destroyed by fire or demolished, pulled down or removed to an extent exceeding one half of its elevational area, every remaining portion of that wall which does not comply with the provisions of the Acts shall either be made to comply or be taken down. Section 149, however, contains a long list of buildings and structures which are exempt from these provisions and by section 154 buildings erected before the commencement of the Act or the coming into force of a by-law are deemed to be in conformity with that Act or by-law if they were in conformity with the previous legislation.

Statutory Rights over Walls and Boundaries

Part VI of the 1939 Act gives extensive rights over party walls and walls, partitions and boundaries between adjoining owners. It is to be noted that these rights are in substitution for, not in addition to, the rights given by the common law. Where the 1939 Act applies the common law rights are lost : *Standard Bank of British South America* v. *Stokes* (1878) 9 Ch.D. 68. In order to determine the nature of the rights given by the Act it is necessary first to determine where the junction line between the two adjoining properties lies.

If, at the line of junction, the lands adjoining that line are built on, or a party fence wall or the external wall of a building has been erected, then the owner who is desirous of carrying out any work (called in the Act the " building owner ") has the rights given to him by section 46. This section applies not only in

relation to party structures (including party walls) or party fence walls. Section 114 of the London Building Act 1930 (which was the section replaced by the present section 46) gave the rights expressly in relation to party structures. The present section 46 uses a more extensive wording which, besides including in effect party walls and party fence walls, also includes the external wall of a building erected at the line of junction. Such a wall, as it neither stands on lands of different owners nor separates buildings belonging to different owners, cannot be a party wall. Thus where there are two adjoining vacant sites and one owner erects a building with an external wall at the line of junction, even although he builds that wall entirely on his own land, he may find that his neighbour has the benefit of some of the section 46 rights. It is to be noted that the majority of the rights in this section are given only in relation to party structures. The right given by paragraph (i) of subsection (1) would in many cases only be operable if the section as a whole extended to other than party walls. It is clear from the case, already mentioned, of *Knight* v. *Pursell* (1879) 11 Ch.D. 412, that an owner who has an external wall on his own land, by allowing a neighbour to build against that external wall, thereby allows this neighbour the more extensive rights given by section 46 as the lands of the adjoining owners are now built on at the line of junction.

If, on the other hand, at the line of junction, the lands adjoining that line are not built on or are built only to the extent of a boundary wall which is neither a party fence wall nor the external wall of a building, then the building owner has the rights given to him by section 45. The rights given by this section can, with one exception, only be exercised with the consent of the adjoining owner. The building owner must give the adjoining owner notice of the wall which he intends to build and then, if the adjoining owner consents in writing, the wall is built as a party wall on the lands of both owners at their joint expense. If the adjoining owner does not consent in writing then any wall must be constructed entirely on the building owner's land. It is well to remember that even if a building owner intends to construct a wall along the junction line, even although the wall is to be entirely on his own land, then he must give notice under this section to the adjoining owner. The exception where consent of the adjoining owner need not be obtained before building on that adjoining owner's property is where a wall is to be built entirely on the building owner's land. In such a case the building owner may place footings and foundations in the adjoining owner's land. However, it would appear that the Act does not give the right to

place such footings and foundations in the adjoining land where the building and adjoining owners had each an external wall of an existing building on their own land adjacent to the junction line: *Thornton* v. *Hunter*, *Building News*, February 4 (1898) Romer J. Although this section contemplates the erection of an external wall on the building owner's own land even in face of strong protest from the adjoining owner, it does not give any right to obstruct ancient lights: *Crofts* v. *Haldane* (1867) L.R. 2 Q.B. 194.

Rights under Section 46

Once a building owner can bring the structure upon which he wishes to commence operations within section 46 he has a variety of rights. The section is set forth at the end at p. 431, *post*. It is to be noted, however, that whenever the expression " party structure " is used this expression includes a party wall. In the consideration of paragraph (a) some help is to be found from the case of *Barry* v. *Minturn* [1913] A.C. 584, where the House of Lords held that the right to make good a party structure which is defective is confined to making good the party structure so that it becomes effective for the purposes for which it is actually used or intended to be used. Thus, merely because a wall is damp does not necessarily mean that a wall is defective. Regard must be had to the purpose of the wall: damp would scarcely be a defect in a wall separating two gardens, but it might well be in a wall separating a garden and a house. The same case also held that where there is a dispute as to the mode of repairing a wall it is the duty of the tribunal appointed by the Act to decide upon a proper method, but in doing so it is not open to them to take into consideration the previous history of that wall. It is not sufficient in order to operate this subsection to show that the structure is defective or in want of repair; it must be shown that remedial work is necessary, so that merely because a party fence wall is unsightly, a building owner would not have the right to demolish and rebuild it. The building owner also has rights of underpinning and thickening a party structure or fence wall under paragraph (e) and rights of demolition and rebuilding under paragraph (f). Paragraph (e), however, applies not only to party structures and fence walls but also to an external wall which may be entirely on an adjoining owner's land. The advantage to the building owner of proceeding, if possible, under paragraph (a) is that the expense of any work carried out thereunder is to be borne by the building and adjoining owners jointly in proportion to the

use which the two owners make or may make of that wall, whereas under paragraphs (e) and (f) the expenses have to be borne by the building owner. Paragraphs (b), (c) and (d) all give rights to demolish structures not in conformity with the London Building Acts or any by-laws made thereunder and to rebuild in conformity with those Acts or by-laws. Before making use of any of these rights it should be remembered that a structure which was erected prior to the date of the commencement of the 1939 Act (January 1, 1940) or the coming into operation of any of the by-laws made under the London Building Acts in conformity with building legislation then in force is deemed to be erected in conformity with the provisions of the London Building Acts and any such by-laws. A structure, however, which has not been completed and is still in progress at the date of commencement of the Act or coming into operation of any by-laws, must be erected in conformity with the provisions of the Act or by-laws unless the London County Council consent to its being completed otherwise. The expense of any work carried out under these paragraphs is to be borne by both the building and adjoining owners in due proportion to the use which the respective owners make or may make of the new structure. Thus a purchaser who purchases a site with the intention of building onto an external wall not in conformity with the Acts or by-laws made thereunder, will, it is submitted, be able to pass on some part of the cost of rebuilding the external wall to the adjoining owner who presumably uses the wall to support his own building. Moreover if the wall upon which the purchaser intends to build is not in conformity with existing legislation he is debarred by section 16 of the 1939 Act from using it as a party wall.

Before exercising the right of cutting away a chimney breast given by paragraph (h) the district surveyor's certificate must be obtained under section 17 (2) of the 1939 Act. Section 17 (2) only applies to chimney breasts or shafts built with or in a party wall. It is submitted that, if the chimney breast projects from an external wall which is not a party wall, no certificate need be obtained from the district surveyor. Paragraph (i) would appear to apply to party structures and external walls and structures which are not party structures.

Where a wooden beam or metallic girder carrying a party wall (technically known as a "bressummer") is to be temporarily removed it is unnecessary to give any notice: *Major* v. *Park Lane Co.* (1866) L.R. 2 Eq. 453.

Notices

Before exercising any of his rights under section 46, unless he has obtained the written consent of both adjoining owner and occupier, a building owner must serve a party structure notice as required by section 47. Having done so and assuming that no difference arises with the adjoining owner then the building owner must begin the work described in the notice within six months from the date of service and carry it on diligently. If a difference arises and reference has to be made to a tribunal under section 55 then, unless the award is made within the six months, the time limit does not apply: *Leadbetter* v. *Marylebone Borough Council* [1905] 1 K.B. 661. Should the work be commenced without notice being given or after the six months' period has expired the adjoining owner could, if he wished, restrain the building owner by means of an injunction. The building owner who employs a contractor to carry out the work should stipulate that the work be executed within a certain time, otherwise, in the event of the contractor being guilty of delay, the adjoining owner might accuse the building owner of not prosecuting the work with due diligence.

It was said in *Hobbs, Hart & Co.* v. *Grover* [1899] 1 Ch. 11, that the notice ought to state with exactitude the kind and extent of the work which the building owner proposes to do or of the buildings he proposes to erect. Unless this is done the adjoining owner is in no position to decide how the work will affect him or whether he wishes to serve a counter-notice asking for requirements of his own to be included. If an inadequate notice is served the adjoining owner should ask the building owner to withdraw it and serve him anew with full details of the proposed works. The drawback, so far as the adjoining owner is concerned, of merely asking for further particulars of the proposed work is that the time in which the adjoining owner must serve any counter-notice runs from the time the building owner serves his notice. Should the building owner refuse to serve a fresh and more detailed notice and proceed upon the original inadequate notice it may be possible to get an injunction to restrain him: see *Sims* v. *Estates Co.* (1866) 14 L.T.R. 55.

Where the only work intended to be done is the removal of a building from an adjoining building and there is to be no disturbance of the party wall between the two, it is not necessary for any notice to be given: see *Lewis and Salome* v. *Charing Cross, Euston and Hampstead Ry.* [1906] 1 Ch. 508, 517. But this same case makes it clear that a building owner, although authorised to demolish a building under an Act of Parliament, must, if he intends to affect a party wall, give notice under this section. Even although

it is not intended to make any use of a party wall in rebuilding, if that party wall or its foundations are to be affected in any way during demolition, then notice must be given. In *Leadbetter* v. *Marylebone Borough Council* [1904] 2 K.B. 893 a building owner rebuilt a party wall. Arising from the notice which he served an award was made which included a term that the adjoining owner might at some future date build on to the top of the wall rebuilt by the building owner. Subsequently the adjoining owner purported to exercise this right given to him in the award. It was held, however, that, where an adjoining owner himself wishes to carry out works after the building owner's operations have been completed, then that adjoining owner becomes a building owner and must invoke the machinery of the Act by himself serving a notice under section 47. The court decided that the arbitrators who made the award had no power to confer the right to carry out further works upon the adjoining owner.

Owners, Building Owners and Adjoining Owners

Under the London Building Acts, whether applied to a building or an adjoining owner, the expression " owner " is not used in a narrow sense of the person having the freehold of the property vested in him. It includes every person in possession or receipt either of the whole or of any part of the rent or profits of any land or tenement otherwise than as a tenant from year to year or for any less term or as a tenant at will. Both a landlord and a tenant, if he has a sufficient tenancy, can be " owners." Thus the term " owner " includes bodies corporate, tenants of part of a house for more than a year (*Fillingham* v. *Wood* [1891] 1 Ch. 51), holders of long leases who have sublet part of the premises (*Hunt* v. *Harris* (1865) 19 C.B.(N.S.) 13), and a party in possession under an agreement for a lease (*List* v. *Tharp* [1897] 1 Ch. 260). It does not include a person who is a tenant at will of the council until a lease is granted (*Orf* v. *Payton* (1904) 3 L.G.R. 126), nor a receiver of the High Court (*Bacup Corporation* v. *Smith* 44 Ch.D. 395), nor, it seems, the incumbent of a church (*R.* v. *Lee* (1878) 4 Q.B.D. 75). It seems doubtful whether a person entitled to a peppercorn rent is an owner (*Evelyn* v. *Whichcord* El., Bl. & El., 126).

The expression " building owner " means such one of the owners of adjoining land as is desirous of building or such one of the owners of buildings, storeys or rooms separated from one another by a party wall or party structure as does or is desirous of doing a work affecting that party wall or party structure. It is apprehended that a tenant from year to year or for any less term or a tenant at will could not avail himself of the rights given to a

building owner. If such a person wished to carry out operations affecting a party wall then, unless the adjoining owner consented, he would have to obtain the co-operation of his landlord and then serve notices and carry out any operations in the latter's name.

An " adjoining owner " is the owner of land, buildings, storeys or rooms adjoining those of the building owner. A building owner about to serve a notice under section 47 must give a good deal of thought and inquiry into the question as to who are the adjoining owners. He may have to serve notices upon more than one person, and it was said in *Fillingham* v. *Wood* [1891] 1 Ch. 51 that it is the duty of the building owner to find out, if possible, who is the adjoining owner. Where an adjoining owner is not served with a notice there is always the possibility that he might obtain an injunction to prevent the building owner proceeding with the work. In such a case the building owner would have to make a fresh start and serve notices anew.

Persons upon whom a Party Structure Notice should be Served

All persons coming within the definition of owner must be served: see *Crosby* v. *Alhambra Co., Ltd.* [1901] 1 Ch. 295; although this same case is authority for the proposition that only one of a class having an interest need be served with a notice. Thus, where there are joint tenants of an adjoining property, only one tenant need be served. It is to be doubted whether the statement in the headnote to *Crosby* v. *Alhambra Co., Ltd.*, that " every person holding an interest in the adjoining premises other than tenants from year to year or at will " is an adjoining owner is supported by the judgment of the learned judge. If this were so it might even be necessary to serve mortgagees. Although any subtenants or tenants of part of the premises only whose interest is greater than from year to year must be served, it is not necessary to serve mere occupiers, licensees or lodgers.

If the building owner is unable to trace the adjoining owner so that it proves impossible to serve the notice required by section 47, then, under section 143 of the 1939 Act, a county court judge may give consent to the work going forward and dispense with any notice. Presumably, as the adjoining owner is unknown, the appropriate county court would be the court having jurisdiction within the district in which the subject-matter is situate.

Where the owner of two adjoining premises lets one of them to a tenant from year to year and then wishes to pull down and rebuild the party wall between the two premises, he presumably need not serve any notice on the tenant from year to year. As

he himself is the owner of the adjoining premises he can, it seems, enter without notice : see *Wheeler* v. *Gray*, 4 C.B.(N.S.) 584, 591; affirmed 6 C.B.(N.S.) 606. Normally the building owner can only dispense with notice if he has the written consent of both the adjoining owner and the adjoining occupier, but in this case the building owner is not availing himself of subsection (4) but rather subsection (1) of section 47.

A party structure notice need not be served where an owner receives notice to pull down a party structure on account of its dangerous state under section 62 of the 1939 Act. But this exception made by section 47 (4) of the 1939 Act only applies to work which is required to be done by the dangerous structure notice; the building owner cannot use the occasion to carry out other work to the party structure: *Spiers & Son, Ltd* v. *Troup* (1915) 13 L.G.R. 633. However, it appears from this case that the building owner can recover a proportion of the expenses of pulling down the dangerous structure although not the expenses of rebuilding. If the building owner wishes to rebuild he should, before the party structure is completely demolished, serve a party structure notice that he intends to carry out work under section 46.

Consequences of a Party Structure Notice

Whenever a party structure notice or counter-notice is served and no consent is expressed in writing within fourteen days from the date of service, a difference is deemed to have arisen between the parties. Consequently, an adjoining owner upon whom a party structure notice and a building owner upon whom a counter-notice is served, should, if they wish the works to be carried out, lose no time in giving their consent, otherwise they may incur costs in the appointment of surveyors to resolve the difference which will be deemed to have arisen.

Once a party structure notice or a counter-notice has been served, a party cannot assign his property and thereby rid himself of his obligations in connection with that notice : see *Selby* v. *Whitbread & Co.* [1917] 1 K.B. 736, 746, 747.

Building operations near, but not on, the Junction Line

So far we have considered only the situation where the building owner desires to carry on operations in the immediate vicinity of the junction line. It may be, however, that where there is a building or structure on the junction line or near the junction line on the adjoining owner's land, the building owner wishes to erect a structure within close proximity to the adjoining owner's building or structure. If the foundations of the proposed structure are not

intended to go below the level of the bottom of the adjoining owner's foundations then the building owner can proceed unaffected by the 1939 Act. If, however, he wishes to build within ten feet of the adjoining owner's structure and to place foundations at a lower level than the adjoining owner's foundations or if he wishes to build within twenty feet and place foundations below a line drawn downwards at an angle of forty-five degrees from the intersection of the plane of the bottom of the adjoining owner's foundations and the plane of the outer face of the adjoining owner's wall, then, under section 50, he must serve written notice on the adjoining owner of his intentions and he may, and the latter may call upon him to, strengthen the foundations of the existing building or structure. Any work done under this section must be paid for by the building owner. Provided that his proposed foundations will go deeply enough this section may, it is submitted, give the building owner who is rebuilding a party wall a right additional to those given to him by section 46, namely a right to strengthen the adjoining owner's foundations.

Power of Entry

Provided that he has complied with the machinery of the Act the building owner is given specific power to enter onto the adjoining owner's land for the purpose of carrying out any works proposed under Part VI of the 1939 Act and provision is made for fining any person who hinders him. Nevertheless he must execute the works in such a manner as to cause the minimum of interference to the adjoining owner or occupier and he must take steps properly to secure or protect the adjoining property.

Expenses

Section 56 of the 1939 Act sets out in detail the manner in which the expenses of carrying out any work are to be borne between the parties. If, after the building owner has executed works, the adjoining owner makes additional use of those works then the building owner is empowered by subsection (4) to recover from the adjoining owner a sum in respect of the additional use made by that adjoining owner. In this connection it has been held that the expression " building owner " here also includes the assigns: *Mason* v. *Fulham Corporation* [1910] 1 K.B. 631. In that case a building owner raised the party wall and then sold his house. The adjoining owner then made greater use of the wall and it was held that the purchaser from the building owner was entitled to recover from the adjoining owner a sum in respect of the greater use made by

the adjoining owner. The expression does not, however, include a tenant of the building owner who carried out the work. Where the owners of a long lease raised a party wall and then let their property to a tenant, it was held, when the adjoining owner made greater use of the party wall, that the tenant could not recover in respect of that greater use : *Re Stone and Hastie* [1903] 2 K.B. 463. The proper people to recover in such a case were the lessors.

Settlement of differences

Where a difference arises between the building and adjoining owner, provision is made in section 55 of the 1939 Act for the appointment of a surveyor or surveyors to settle that difference with a right of appeal from any decision by such surveyor or surveyors to the county court or, in certain circumstances, the High Court. Where the parties to the difference each appoint a surveyor and then in turn appoint a third surveyor, the latter is not in the position of an umpire between the other two. Rather is he a third arbitrator so that, should there be dispute among the surveyors, the award is made by any two of them. Only where no two surveyors are in agreement does the third surveyor make the award alone. There is no reason, unless the London County Council are a party to the difference, why the district surveyor should not be appointed as third surveyor : *Seawell* v. *Webster* (1859) 7 W.R. 691. It is advisable that no work should be done until the award has been made, although, if the dispute is merely as to the question of cost, the adjoining owner may consent to work being begun without prejudice to any question of payment.

The surveyors have an exclusive and continuous jurisdiction. The award cannot be questioned except by the county court or High Court and their jurisdiction lasts until all differences between the two parties have been finally settled. There may be circumstances when the surveyors are unable to make their award until after the work has been carried out and they have the power, if circumstances require it, to make interim awards : see *Selby* v. *Whitbread* [1917] 1 K.B. 736, 742, 744. They have jurisdiction in regard to all matters arising from work of which notice has been given. They can properly determine what work is to be done and the manner in which it should be carried out; they can assess the value of any damage suffered by the adjoining premises as the result of the work being carried out or determine whether the building owner would suffer injury or be caused unnecessary inconvenience by the execution of works required by a counter-notice: *Adams* v. *Marylebone Borough Council* [1907] 2 K.B. 822, 831, 832. It is probable also that they can determine whether the

building owner is exercising his rights in such manner or in such time as to cause unnecessary inconvenience to the adjoining owner or whether proper steps have been taken to secure or protect the adjoining property.

Although their jurisdiction is wide, it is limited to matters arising from notices given by one party to another. There is no jurisdiction over differences between the parties which do not arise from work of which notice has been given under Part VI of the Act. If the building owner gives notice that he intends to rebuild a party wall, the surveyors cannot make it a term of their award that the adjoining owner shall have the right at some future time to raise that rebuilt wall: *Leadbetter* v. *Marylebone Borough Council* [1904] 2 K.B. 893. In the event of the adjoining owner wishing to raise the party wall at some future time he must himself serve a notice under section 47 and become a building owner. Nor can the surveyors settle any difference which has arisen as the result of the building owner's operations causing damage to the adjoining owner's trade or business : *Adams* v. *Marylebone Borough Council* [1906] 2 K.B. 767, affirmed [1907] 2 K.B. 822, although an adjoining owner suffering such damage might be able to show that the building owner was exercising his rights in such a manner as to cause unnecessary inconvenience. The surveyors' jurisdiction does not extend to such questions as to whether the building owner has obstructed ancient lights to which the adjoining owner is entitled: *Adams* v. *Marylebone Borough Council* [1907] 2 K.B. 822, 832, 842; *Crofts* v. *Haldane* (1867) L.R. 2 Q.B. 194.

Once an award has been made there is a right of appeal to the county court or to the High Court after obtaining leave from the county court. The county court with jurisdiction will be the court for the district in which the structure in question is situated. There may be cases where a dissatisfied party can go straight to the High Court, as where the surveyors make an award in excess of their jurisdiction: *Stone* v. *Hastie* [1903] 2 K.B. 463. After an award has been made, a building owner cannot avoid his liabilities under that award by assigning his property to another: *Selby* v. *Whitbread & Co.* [1917] 1 K.B. 736, 746, 747.

Right of Support

An owner of a building may have a right to have that building supported by his neighbour's wall. At common law the owner of a servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. The position is unaffected by the London Building Acts, and so where a wall separating buildings belonging to adjoining owners stands entirely

on the land of one of those owners, although both buildings rely upon that wall for support, the owner of the land upon which the wall stands is under no obligation to repair the wall should it fall into disrepair. Of course the owner of the dominant tenement has the power as a building owner under section 46 of the 1939 Act to repair the wall and it may well be that, under the machinery for apportioning the cost of doing any work under this section, the owner on whose land the wall stands will have to bear part of the expense in so far as he will derive benefit from repair to the wall. Where his neighbour enjoys an easement of support, the owner on whose land the wall stands is not entitled to remove any support for the adjoining owner's building without providing an equivalent support. He cannot adopt the attitude that, because the wall is his, he has the right to remove it. It follows therefore (and was decided in *Bond* v. *Nottingham Corporation* [1940] Ch. 429) that, even although a demolition order is made, neither the owner nor a local authority may demolish a building upon which a neighbouring building has a right of support without providing an equivalent support for the neighbouring building.

A right of support is not unaffected by the London Building Acts. Where no notice has been served by a building owner, an adjoining owner enjoys any right of support as he would at common law; but once a building owner has served notice under section 47 the common law rights are replaced by the statutory rights: *Selby* v. *Whitbread* [1917] 1 K.B. 736. However, this latter principle ought to be considered in the light of two later decisions. In *Upjohn* v. *Seymour Estates, Ltd.* [1938] 1 All E.R. 614 a building owner proceeded to demolish under the authority of the London Building Acts a building adjacent to a party wall. During the course of the work his half of the party wall collapsed and the adjoining owner was held to be entitled to damages for the withdrawal of support from his half of the wall. In *Burlington Property Co.* v. *Odeon Cinemas* [1938] 3 All E.R. 469 the vendor, when selling one of the adjacent properties which he owned, reserved for himself and his successors a right to use a wall on the land to be sold for the support of any buildings which he might wish to erect. It was held that the purchaser and his successors, even when exercising their rights under the London Building Acts, could only rebuild the wall in such a form as would not interfere with the vendor's right of support.

Questions for the Conveyancer

The purchaser of property which is either an existing building or a vacant site has therefore to consider the rights which he may

have in the event of his desire to extend or improve his property and the liabilities he may incur in the event of either the party structure becoming defective or the adjoining property being extended or developed. He must consider not only his own rights but also the rights of the owners of the adjoining property should he or they become a "building owner" under section 45 or 46 and the contributions which he may be called upon to make if the owners of the adjoining property should exercise the rights of a building owner. In particular he may wish to consider the following points :—

(i) Whether the junction line is already built on.
(ii) Whether any wall on or near the junction line is a party wall.
(iii) The state of repair of that party wall.
(iv) Any projection or peculiarities in that party wall.
(v) Whether the party wall is built in conformity with the London Building Acts.
(vi) Whether he or the adjoining owner is likely to carry out works on the junction line or to any party wall.

It may be that the conveyancer is concerned in a situation where the vendor owns both the property to be conveyed and the adjoining property. In such a case it is always advisable to deal with the question of any party walls in the conveyance. Otherwise the house conveyed might be so described by measurements as to exclude the dividing wall from the grant : see *Murly* v. *McDermott* (1838) 8 A. & E. 138; or, conversely, the whole of the dividing wall may be conveyed to the purchaser. Even although the wall does stand entirely on the land of one of the owners it may still be a party wall if it separates buildings: but particular care must be taken if the wall is an external wall of one building only, because, if both wall and building stand on the land of one owner, only limited rights may be available to the other owner. The conveyancer may find it convenient to convey only half the wall, reserving rights of support and user in the other half, or to convey the whole wall reserving a right to build onto such wall at a future date. If he has information as to the development to be expected he may make provision in the conveyance as to the rights of the parties, the manner in which the work is to be carried out and the way in which the cost is to be apportioned. There is no reason why, in such a case, the rights given by the London Building Acts should not be supplemented or varied by agreement.

GOOD RIGHT TO CONVEY

By J. B. Sweetman, ll.b., Solicitor

The recent case of *Pilkington* v. *Wood* [1953] Ch. 770 (noted in Vol. 17, p. 407), has focused attention anew on the question of the value and extent of the implied covenants for title in a conveyance. Only too frequently the conscientious solicitor acting for a purchaser has his enquiries into doubtful points on a title met by a figurative shrug of the shoulders and the argument (if such it can be called) that his client can always rely on the covenants for title if anything goes wrong. In the case mentioned it was argued that the plaintiff should have mitigated the damages, caused by his solicitor's negligence in investigating title, by suing on the covenants for title. Harman J. disagreed, saying: "The defendant, however, argues that it is the duty of the plaintiff before suing him in damages to seek to recover damages against his vendor Colonel Wilks under the covenant for title implied by reason of the conveyance as beneficial owner. . . . I listened to a considerable argument based on the extremely difficult words in which is couched the contract (*sic*) to be implied under section 76 of and Sched. II to the Law of Property Act, 1925 . . . That is a question which I do not propose to decide. Nor need I decide whether Colonel Wilks, having regard to his position, was the 'beneficial owner' of the property so as to bring the covenant into operation, it being a *sine qua non* that the covenantor must be in fact, as well as being expressed to be, the beneficial owner : compare the observations of Sir Wilfrid Greene M.R. in *Fay* v. *Miller Wilkins & Co.* [1941] Ch. 360, 363, where he was discussing the covenant implied in an assurance by a vendor as personal representative. . . . I do not propose to attempt to decide whether an action against Colonel Wilks would lie or be fruitful. I can see that it would be one attended with no little difficulty . . . a complicated and difficult piece of litigation against a third party." It appears that in the learned judge's view a purchaser cannot be reasonably expected to place reliance on the covenants for title where a defect appears on investigation, and that the interpretation of the implied covenants is a matter of grave difficulty.

What then are the main difficulties about the interpretation and application of the implied covenants? The first, and that referred to in the judgment just quoted, is to decide whether the covenants

are implied at all where the person who conveys is not in fact what he expresses himself to be—as in the case of a trustee who purports to convey as "beneficial owner." This point has been amply discussed elsewhere (see 7 *Conveyancer* (N.S.), 3, "Implied Covenants for Title"), and it is not intended to say more about it here than to suggest that, if the practice of conveyancers over the years has been wrong and Sir Wilfrid Greene was right, it may be considered necessary to insert in conveyances a short clause expressly declaring that the covenants contained in Part I of the Second Schedule (or as the case may be) of the Law of Property Act, 1925, shall be deemed to be incorporated in the deed. The second difficulty, and perhaps the more fundamental one, is to decide whether the implied covenants cover cases where the vendor never was the owner of the property at all, or never the owner free from incumbrances affecting the property. It will be convenient to confine discussion of this point to the normal case of a conveyance for value "as beneficial owner" importing under section 76 (1) (a) of the Law of Property Act, 1925, the covenants set out in Part I of the Second Schedule of the Act. (It should be emphasised that the covenants by a mortgagor under section 76 (1) (c) and Part III of the Second Schedule are not qualified in the same manner as those under Parts I and II.) The covenants implied are known briefly as for "good right to convey," "quiet enjoyment," "freedom from incumbrances" and "further assurance." The first and third covenants are broken (if at all) upon the execution of the conveyance, the second only if some actual disturbance occurs, and the fourth only if there is a failure after the conveyance to execute some further document to rectify the title. Supposing that a purchaser finds that the vendor had no title to the property, or that the property was at the time of the conveyance subject to incumbrances other than those subject to which it was expressly made (it is not sufficient in this connection for a recital to have been inserted referring to the incumbrance: *Page* v. *Midland Railway Company* [1894] 1 Ch. 11), there might appear to be a breach of the implied covenants on which he could sue. But there are qualifying words which regulate the whole operation of these implied covenants, and which must be quoted in full: "That, notwithstanding anything by the person who so conveys, or anyone through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered. . . ." It is clear that the vendor can be sued in respect of something done by a predecessor in title from whom he obtained the property otherwise than for value (marriage not counting as a valuable consideration

for this purpose); on the other hand, it is equally clear that he cannot be sued for something done by a person from whom he bought for value, unless he himself has "made, done, executed or omitted or knowingly suffered" something affecting his ability to fulfil the covenant. (The fault may sometimes go back for many generations, *e.g.*, to about 1782 in *Stoney* v. *Eastbourne R. D. C.* [1927] 1 Ch. 367.) In *Williams on Title* (1948), p. 598, footnote (n), and in an article by the author of that book in *The Law Journal* of May 25, 1951 (Vol. CI, p. 284), it is stated that the covenant for good right to convey is a covenant that the grantor has a good title to the very estate in quantity and quality which he purports to convey (citing *Howell* v. *Richards* (1809) 11 East 633) and that, if the grantor has no such title, the covenant is broken at the moment of completion (citing *Turner* v. *Moon* [1901] 2 Ch. 825). Other writers, however, do not appear to be willing to subscribe to such a sweeping statement, and it is perhaps not unfair to quote Williams' *Vendor and Purchaser* (4th ed.), Vol. 1, p. 665: "Even a man having no title at all . . . if he sold and conveyed as 'beneficial owner' of the land . . . which he had wrongfully assumed was his would incur no liability on the statutory covenants for title in case of the ejectment of the purchaser by the rightful owner." And *Emmet on Title* (13th ed., Vol. 1, p. 527), says: "It will be noted that the vendor must have had a title originally. For instance, if a squatter sold the land before he had acquired a full title under the Statute of Limitations, it could not be said that he had had a title, and he therefore would not be liable under the implied covenant." There is here a conflict on a most fundamental point, which cannot be adequately considered without reference to the history of covenants for title.

The implied covenants now set out in the Law of Property Act, 1925, were originally contained in the Conveyancing and Law of Property Act, 1881, but, of course, they were only intended to make unnecessary the insertion in every conveyance of the express covenants for title which had been inserted as the common practice of conveyancers for centuries before that. For that reason, it is necessary when considering the implied covenants to have regard to the practice before 1882 and the decisions which had been given on covenants for title before then. Before coming to the case of *Howell* v. *Richards* mentioned above, it will be well to examine a passage from the judgment of Lord Eldon C.J. in *Browning* v. *Wright* (1799) 2 Bos. & Pull. 13, which very clearly sets out the old law and practice: "This transaction is a purchase of an estate of inheritance in fee, and the first question is, What will be the nature and effect

of a conveyance carrying such a contract into execution? If a man purchase an estate of inheritance and afterwards sell it, it is to be understood prima facie that he sells the estate as he received it: and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestor: and, if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. In fact, he says, I sell this land in the plight that I received it, and not in any degree made worse by me. It was argued that, if this were so, a man who has only an estate for life might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact whether the vendor be really putting the purchaser into the same situation in which he stood himself. If he has bought an estate in fee, and at the time of the re-sale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the owner's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship nor injustice can ensue. What is the common course of business in such a case? An abstract is laid before the purchaser's counsel; and though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate and how far it is supported by the title. . . . Prima facie, therefore, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs."

In *Howell* v. *Richards* the conveyance contained covenants in what was then the usual form, *i.e.*, (1) that the vendors were absolutely seised of an indefeasible estate of inheritance in fee simple, (2) for good right to convey and (3) for quiet enjoyment. (It is to be noted that the first covenant has not been included in the implied covenants for title but this really makes no difference because the second covenant is "of the same import and effect and directed to one and the same object"—*per* Lord Ellenborough in *Howell* v. *Richards*.) The first two covenants were qualified by the words "notwithstanding any act matter or thing by them (the vendors) or any or either of them done to the contrary," but the covenant for quiet enjoyment did not contain these qualifying words, and the sole question to be decided was whether the "quiet enjoyment" covenant was absolute, or should be construed along with the other

covenants as qualified by the preliminary words. The phrase, " The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, *viz.* in this case an indefeasible estate in fee simple," was in this context merely descriptive of the nature of the covenant, and not intended to indicate that there was anything absolute about the covenant for title (or for good right to convey) which was expressly limited by the words " notwithstanding any act matter or thing by them or any or either of them done to the contrary." There was no suggestion at all of an absolute warranty of title. (Nor was there in *Turner* v. *Moon*, where the defendant himself had granted rights of way affecting the property conveyed.)

To add a third example of the old practice, reference may be made to the judgment of Erle C.J. in *Thackeray* v. *Wood* (1865) 6 B. & S. 766. " Upon a sale of real property it is for the purchaser to ascertain what the title of the vendor is, and to satisfy himself that he has a good title. The vendor then makes a conveyance and usually covenants that he has done no act to affect or derogate from his title. If the vendor has no title at all to the property conveyed, there would be no breach of such a covenant."

The only question is, therefore, whether the Conveyancing and Law of Property Act, 1881, intended to alter the established practice of conveyancers, except by making it unnecessary to set out the covenants at length in every conveyance. The qualifying words in the statute (now Law of Property Act, 1925, Sched. II, Pt. 1) are, " That notwithstanding anything by the person who so conveys or any one through whom he derives title otherwise than by purchase for value, made, done, executed or omitted, or knowingly suffered. . . ." Of course, there was prior to the 1881 Act no standard form of covenant for title, and it may be true that in some respects the liability of the vendor may be greater under the implied covenants than it would have been under some of the old precedents of express covenants. But it is submitted that there was no intention of altering anything that could be described as a general practice and this view is supported by the statement by Lindley L.J. in *David* v. *Sabin* [1893] 1 Ch. 823, " The covenants set out in the Conveyancing Act must be construed with reference to the ordinary course of business in sales of land and to the practice of conveyancers." There is nothing unfamiliar in this connection about the words " made," " done " and " executed." In covenants entered into before the Act of 1881, it seems to have been more usual to speak of positive acts rather than of failures to act. It was not uncommon to speak of " any act, neglect or default," but

the word " omission " does not seem to have been commonly used. In *Dart on Vendor and Purchaser*, 8th ed., p. 671, it was stated that " the omission to acquire from other parties a valid title, though the vendor knew the defect, is not a ' neglect or default ' within the meaning of a covenant for title." The case of *Woodhouse* v. *Jenkins* (1832) 9 Bing. 431, cited by Dart as authority for this statement, does not appear entirely to justify such a generalisation. Tindal C.J. showed quite clearly that omission to acquire a title might sometimes fall within a covenant for quiet enjoyment, though in that particular case the lessor had not been guilty of any " neglect or default." He said: " Now it must be admitted that the eviction would have been prevented if [the lessor] at the time he took the leases for 99 years [the head leases] had required the lessors to join in common recoveries to cut off the entails, and if the lessors had complied with such requisition. The question is, therefore, whether the not procuring such common recoveries to be suffered was a ' neglect or default ' in [the lessor] within the meaning of the covenant. And we are of opinion that no breach of covenant could be assigned on those words, unless it could be averred in the declaration, that [the lessor] had the power or means of procuring such common recoveries to be suffered by his lessors, and that he neglected or omitted so to do. With such an obligation made and proved, we think an action of covenant might possibly be maintainable, but not without it." He went on to stress that there must be some sort of a breach of duty, not merely a lack of discretion. But at least if the lessor could be proved to have failed to take normal steps available to him which would have secured a good title, Tindal C.J. would have considered him guilty of " neglect or default " within the covenant.

Are the words " omitted or knowingly suffered " in the implied covenants intended merely to replace in another form the old words " by any neglect or default " ? There is some support to be found for construing the word " omission " (apart from any special context) in a wider sense. For instance, in *Partridge* v. *Partridge* [1894] 1 Ch. 351, North J. was clearly prepared to treat failure by an infant to fulfil a condition of residence as an " omission," though in view of his tender years it could not be considered either as a " refusal " or as " neglect " to do so. And in *Eastwood* v. *Ashton* [1915] A.C. 900; 1 Ch. 523, a case on covenants for title, Sargent J. in the court of first instance said, " I am equally unable to accept the argument that there can be no omission unless the failure is to do something which there is a duty to do." (In the case in question it was clear that the vendor had knowingly suffered acts constituting

a disturbance, which made him liable. In the speech of Earl Loreburn in the House of Lords, he was said to have "taken no steps to protect himself" against the growth of an adverse title, in fact to have "suffered" a fence to be erected, and thus to have "omitted" to defend his own right.) On the other hand, in *London & South-Western Railway Company* v. *Flower* (1875) 1 C.P.D. 77, it was considered that an "omission" to perform a duty involved the idea that the person to act is aware that performance is required or needful. It is submitted that a man cannot in any sense be said to have "omitted" to do something unless he had at some time the opportunity (not necessarily the duty) to do it. If he neither knew nor could have known about it, he cannot have "omitted" it. Accordingly, a vendor cannot, in the absence of knowledge or negligence, be liable where he never had a title. This proposition is supported by dicta in *David* v. *Sabin* (*supra*), by Romer J. in the court of first instance: "And it is clear that the word 'omitted' in the covenant does not extend to a case where the covenantor, when he purchases and resells a property, does not perfect his title by getting in an incumbrance of which he is unaware"; and by Lindley L.J.: "This view of the case renders it unnecessary to decide whether Sabin's omission to get in the underlease would of itself amount to a breach of his covenant. Upon this point, therefore, I will say no more than that, as he knew nothing about them, he did not knowingly suffer them to remain outstanding; and although in one sense he omitted to get them in, I see no answer to his counsel's contention that if a vendor who takes all reasonable care is liable for not getting in an incumbrance of which he knows nothing, the statutory covenant would really be a warranty, which it clearly is not." It is submitted that these dicta are consistent with the remarks of Tindal C.J. in *Woodhouse* v. *Jenkins* (*supra*) and that they form the true basis for application of the implied covenants for title. The use of the words "omitted or knowingly suffered" was not intended to alter the practice which was based on the words "by any neglect or default," and the principle remains that the covenant for good right to convey is not intended as a warranty and does not operate in regard to acts defaults and other matters except those arising since the last conveyance for value, *i.e.*, since the last covenants for title were given.

It is to be hoped that some courageous purchaser may soon be found who will put to the test, first, whether Sir Wilfrid Greene's observations in *Fay* v. *Miller Wilkins & Co.* (*supra*), were correct, and secondly, under exactly what circumstances a vendor who never had a title can be made liable on the covenants implied against

a "beneficial owner." Until that happens, there must be much uncertainty; but it is submitted that the position at present indicated by the decisions in regard to the second question is somewhat as follows:

(1) If the vendor never had a title, knew he had no title, but nevertheless purported to convey in fee without informing the purchaser of the defect, the purchaser might have an action for damages for fraud, but no claim would lie on the covenant for title. (The distinction is important, in that the benefit of a covenant for title runs with the land whereas the right to sue for damages for fraud does not.) Of course, if the purchaser knew of the defect, he could not sue even for fraud, since he was not deceived.

(2) If the vendor never had a title, but did not and could not reasonably have known of the defect, the purchaser has no remedy.

(3) If the vendor had only an imperfect title, but could by the exercise of reasonable diligence have perfected his title, he may be liable on the covenant for title; but it must be proved that it was at some time definitely within his power to perfect the title (*Woodhouse* v. *Jenkins*, *supra*).

(4) If the vendor had a good title but by any act parted with it, he would be liable on the covenant; and this even though he reasonably believed that he had recovered it (*David* v. *Sabin*, *supra*).

(5) If the vendor had a good title and lost it by some neglect or default, he would be liable on the covenant (*Eastwood* v. *Ashton*, *supra*); but *semble*, if he had a title and lost it without any neglect or default, he would not be liable.

(Where "the vendor" is referred to in connection with covenants for title in this paragraph, it should, of course, be understood that reference is intended not only to the vendor but to the persons for whom he is responsible, *i.e.*, anyone through whom he derived title otherwise than for value. And the suggestions made are equally applicable *mutatis mutandis* to the covenant for freedom from incumbrances.)

THE HOUSING REPAIRS AND RENTS ACT, 1954

Part I

The "Housing" Part

By J. F. Garner, ll.m., Town Clerk of Andover

Part I—the "Housing" as distinct from the "Rent Acts" Part—of the Housing Repairs and Rents Act, 1954 (herein referred to as "the 1954 Act"), will be of importance to conveyancers mainly in respect of two particular matters, namely the amended provisions regulating the making of improvement grants to private individuals (*a*), and the sections dealing with "deferred demolition" and the restorative action to be applied to condemned houses under the new slum clearance schemes which local authorities are being encouraged to undertake. We deal with these matters first, and then discuss briefly the other provisions in Part I of general interest.

(A) Improvement Grants

The provisions of the 1954 Act dealing with this matter are contained in section 15; the conditions under which grants under the Housing Act, 1949, may be approved in future, have also been revised (and in some measure simplified) by administrative action, notified in Ministry of Housing and Local Government Circular 36/54 dated April 20, 1954.

The most important change made by the Act is the reduction from thirty to fifteen years, of the minimum period for which the dwelling or dwellings to be grant-aided must be capable of providing satisfactory housing conditions, when improved, as a result of the execution of the works in respect of which a grant is sought. In such case the local authority (*b*) must be satisfied that "it is expedient in all the circumstances that the application should be approved," a discretion against the refusal of which there is no appeal, either legal or administrative. Consequent on this amendment, the requirement that the applicant must have (an absolute

(*a*) The original provisions, contained in the Housing Act, 1949, and which the present Act amends, were discussed in an article by the present writer published in this Journal in Volume 17, page 13.

(*b*) The Minister does not now have to approve applications from private individuals: Circular 36/54, para. 5. Applications should be addressed to the local housing authority, and the original form of application (see Ministry of Health Circular 90/49) has not been revised.

interest or) a leasehold interest with not less than thirty years to run, is reduced to a minimum requirement of such an interest with not less to run than thirty years or for a period equal to the period for which the dwelling concerned will provide satisfactory housing accommodation—whichever is the shorter. By way of further consequential amendment, the conditions of section 23 (1) of the Housing Act, 1949 (which under that Act were to apply for a period of twenty years from the day when the dwelling is first occupied after the improvement works have been carried out) will remain effective for such shorter period than twenty years as the local authority may by order direct, in any case where the dwelling is not likely to provide satisfactory housing accommodation for a period exceeding twenty years (*bb*).

The conditions under which a grant will be made, have been relaxed as follows :

(a) The minimum cost of the works, fixed at £100 by the 1949 Act, and raised to £150 by the Housing (Improvement Grants) (Expenses) Regulations, 1952 (*c*), has now been restored to £100 (*d*);

(b) The maximum figure for the cost of particular works of improvement (*e*) has been struck out of section 20 (4) of the 1949 Act (1954 Act, section 15 (4)), but it is now provided that any improvement grant paid may not exceed one-half of the total cost of the improvement works, or £400, whichever is the less; but the figure of £400 may be altered from time to time by Ministerial Regulations, and the Minister may allow a higher grant in any particular case, where the local authority are satisfied that there is "good reason" therefor;

(c) In the computation of the cost of the works ranking for grant, the fees of an architect, engineer, surveyor, land agent, etc. (but not of a solicitor), may be included (*f*), and these fees may also be included in the "estimates" referred to in section 20 (2) of the 1949 Act (*g*);

(d) Until recently, it was an essential requisite of the approval of an application for a grant, that the dwellings when improved should satisfy all the standards laid down in the 1946 Report of the Central Housing Advisory Committee on "Standards of

(*bb*) 1954 Act, s. 16.
(*c*) S.I. 1952, No. 1819.
(*d*) See the Housing (Improvement Grants) (Expenses) Regulations, 1954, (S.I. 1954, No. 478), revoking the Regulations of 1952 above cited, and thereby restoring the minimum figure contained in the Act of 1949 itself.
(*e*) The figure in the 1949 Act itself was increased to £800 by the 1952, and repeated in the 1954, Regulations.
(*f*) Circular 36/54, para. 19.
(*g*) 1954 Act, s. 16 (5).

Fitness" (*h*). This requirement has, however, been relaxed (*i*), so that in future the following conditions only need be complied with in this respect, namely that the dwelling(s) must, after improvement or conversion (*j*),

(i) be in good state of repair and substantially free from damp (*k*);
(ii) have each room properly lighted and ventilated;
(iii) have an adequate supply of wholesome water laid on inside the dwelling;
(iv) be provided with efficient and adequate means of supplying hot water for domestic purposes;
(v) have an internal or otherwise readily accessible water closet;
(vi) have a fixed bath (or shower (*l*)) preferably in a separate room;
(vii) be provided with a sink or sinks and with suitable arrangements for the disposal of waste water;
(viii) have a proper drainage system;
(ix) be provided in each room with adequate points for gas or electric lighting (where reasonably available (*m*));
(x) be provided with adequate facilities for heating (*n*);
(xi) have satisfactory facilities for storing (*o*), preparing and cooking food;
(xii) have proper provision for the storage of fuel (where required (*m*)).

The former additional requirements of a surfaced path to outbuildings, and a convenient access from a street to the back door, are now omitted. It should also be noted that the power of the Minister to relax any particular requirement in any individual case, on the request of the local authority (*p*), has been preserved.

The whole scheme of improvement grants remains discretionary —the local authority cannot be compelled to approve any particular application—but the Minister has emphasised that the means of the

(*h*) See Circular 90/49 of the Ministry of Health, Appendix III, para. 9.
(*i*) Circular 36/54, para. 11.
(*j*) These standards should not be confused with the new standards of "unfitness" contained in s. 9 of the 1954 Act and discussed below.
(*k*) This relaxation of the former requirement that the dwelling must "be in all respects dry" suggests that in some circumstances it may be possible to accept for grant a dwelling in which it is not proposed to construct any damp-proof course.
(*l*) This minor alternative is new.
(*m*) This again is a minor relaxation.
(*n*) Not necessarily "each habitable room," as in the former standards.
(*o*) Not necessarily "a well-ventilated larder or food store," if the facilities are otherwise satisfactory.
(*p*) Housing Act, 1949, s. 20 (3), proviso.

applicants should not be taken into account by a local authority when considering an application for a grant; in particular an application should not be refused solely because the local authority consider that the applicant could afford to carry out the improvement works entirely at his own expense (*q*).

Further changes concern the provisions whereby the maximum rent of an improved dwelling in respect of which a grant has been made has to be fixed by the local authority. These provisions of the 1954 Act may be summarised as follows :

(a) under the 1949 Act (*r*), the local authority were required to fix a maximum rent for a dwelling in respect of which an application for an improvement grant was approved, only where a new dwelling would be provided by the works, or where the authority were satisfied that the dwelling to be improved had not been let as a dwelling during the previous five years. Under the 1954 Act (*s*), a maximum rent will have to be fixed in any case where the dwelling provided or improved would become or is a dwelling-house to which the 1920 Rent Act applies. When a rent has been so fixed, that will become the standard rent for the purposes of the Rent Acts (*t*);

(b) in fixing a rent in any such case, the local authority must have regard to the age of the building, the character and condition of the dwelling after the carrying out of the proposed improvement works, and the cost of those works (*u*);

(c) where no maximum rent is fixed by the local authority (*a*), the maximum rent that will apply to the dwelling for the relevant period (*b*) under section 23 (1) (c) of the 1949 Act will now be the previous rent, plus an increase of *eight per cent.* (not six, as previously) on the portion of the approved expense of carrying out the improvement works that has fallen on the applicant (*c*).

(B) Deferred Demolition

The introductory sections of Part I of the 1954 Act are concerned with new powers given to local authorities, in order to ensure that

(*q*) Circular 36/54, paras. 13–18.
(*r*) See s. 22 thereof.
(*s*) S. 37 (1).
(*t*) *Ibid.*, s. 37 (2).
(*u*) *Ibid.*, s. 16 (6).
(*a*) The number of cases in which the local authority do *not* fix such a rent will now be considerably less, in view of s. 37 (1) of the 1954 Act (para. (a) above). On the other hand, in view of s. 16 (6), *ibid.*, the local authority, in arriving at the rent they fix, are obliged to take the cost of the works into account.
(*b*) This is not now necessarily as long as 20 years: 1954 Act, s. 16 (3), *supra*.
(*c*) 1954 Act, s. 16 (8).

a house should not be demolished unless and until the maximum amount of "life" as housing accommodation has been squeezed out of the building. In the notes following, a distinction has been made between cases where the local authority have taken, or are considering taking, initial action under section 11 of the Housing Act, 1936 (demolition orders), or section 25 and the following sections of the same Act (clearance area procedure). These new powers make considerable inroads on the general principle of the 1936 Act, that once a demolition order or clearance order has become operative with reference to a particular house, it thereupon becomes the statutory duty of the local authority to secure its demolition or clearance of the area.

For the sake of completeness, reference is also made to the other, less important, exceptions to the general principle mentioned, introduced by the Local Government (Miscellaneous Provisions) Act, 1953, sections 10 and 11 (hereinafter referred to as "the 1953 Act").

(a) *Alternatives to the making of a demolition order*

Under the Act of 1936 itself, the only alternative to the making of a demolition order (*d*), once the local authority had decided that a particular house was unfit for human habitation, and could not be rendered so fit at reasonable expense, was to accept an undertaking, either that works would be carried out to make the house so fit, or that the house would not be used for human habitation until it had been rendered fit (see section 11 (2) and (3)). Unless such an undertaking were forthcoming (within 21 days), it then became the duty of the local authority forthwith (*e*) to make a demolition order. There are now the following further courses open to the local authority, in lieu of making a demolition order:

(i) to make a closing order, in any case where the local authority consider it inexpedient to make a demolition order, having regard to the effect of the demolition of that house upon any other house or building (*f*); *or*

(ii) to purchase (by agreement or compulsorily) the house for temporary housing accommodation, if it "is or can be

(*d*) Apart from s. 3 of the Housing Act, 1949, in the case of a house of special architectural or historic interest.

(*e*) In a Scots case, this expression (in a similar statute) was said to have been used "for the purpose of spurring on a local authority to a zealous and active prosecution of its duty to close houses which are unfit for human habitation": *per* Lord Normand in *Brown* v. *Bonnyrigg Magistrates*, 1936 S.C. 258, at p. 265.

(*f*) Local Government (Miscellaneous Provisions) Act, 1953, s. 10 (1), reversing the effect of *Birch* v. *Wigan Corporation* [1952] 2 All E.R. 893.

rendered capable of providing accommodation of a standard which is adequate for the time being " (*g*).

(b) *Alternatives to demolition*

Similarly, under the 1936 Act, once a demolition order made by a local authority has become operative (*h*), it thereupon becomes the duty of the local authority to secure the demolition of the house, either by the owner or by the authority themselves acting in default. There are now the following courses open to the local authority, whereby the " life " of the house may be saved—at least temporarily :—

(i) to substitute a closing order for the existing demolition order (*i*);

(ii) to permit works of " reconstruction, enlargement or improvement " to be carried out to the house, such as will result in the provision of one or more houses fit for human habitation, on the receipt of proposals from the owner of the house in that behalf (*k*). The local authority may make an improvement grant to assist such works if the normal conditions are satisfied. This procedure should prove popular, and is an improvement on section 50 of the 1936 Act, which could not be implemented once demolition order procedure had been started; *or*

(iii) to license the house for temporary accommodation, in any case where the demolition order had been made before the commencement of the 1954 Act; the demolition of the house would thereupon be deferred correspondingly (*l*).

The last-mentioned power replaces—and to some measure extends—the emergency powers of Defence Regulations 68A and 68AA, now revoked. If a licence originally granted under the Regulations, or under section 6 of the 1954 Act, is eventually revoked, the local authority may then purchase the house, either by agreement or compulsorily (*m*). In addition to the above courses open to the local authority, the local county court may order a

(*g*) Act of 1954, s. 3 (1). The standard required in this section (and in other sections mentioned below) is not defined in the Act, but as a local authority's proposals will rank for an Exchequer contribution under s. 7 of the 1954 Act only if approved by the Minister, in most cases that approval will be sought before action is commenced, and it is anticipated that he will require the house to have a " life " of approximately fifteen years.

(*h*) See Housing Act, 1936, s. 15 (5).

(*i*) Local Government (Miscellaneous Provisions) Act, 1953, s. 11 (2); the grounds on which such an order may be made are the same as those applicable to an order made under s. 10 (1), *ibid.*, *supra*.

(*k*) Act of 1954, s. 5.

(*l*) *Ibid.*, s. 6 (1). The date referred to is August 30, 1954; s. 54, *ibid.*

(*m*) *Ibid.*, s. 6 (6).

demolition order to be quashed, where the authority are satisfied that works have been carried out since the making of the order, which have rendered the house fit for human habitation (*n*). This jurisdiction applies only where an application is made to the court by the owner of the house, before August 14, 1954.

(c) *Alternatives to enforcement of a clearance order*

Under the 1936 Act, by section 25 (3) thereof, once a local authority have declared an area to be a clearance area, they must proceed to secure the clearance of the area, by ordering the demolition of the buildings in the area, and/or by purchasing land and securing the demolition of the buildings. There are now the following courses open to the local authority, once a clearance area has been declared :

(i) postpone the demolition of houses on land purchased by or belonging to them, where the houses are, or can be rendered, capable of providing housing accommodation which is adequate for the time being (*o*);

(ii) where the local authority have taken action under paragraph (i) above, they may postpone the enforcement of demolition of any other buildings (other than houses) in the clearance area (*p*);

(iii) retain a house on land purchased by or belonging to them, where it is required for the support of another house retained by them for temporary accommodation, or where there is " some other special reason why it should not be demolished for the time being " (*q*);

(iv) retain for temporary housing accommodation a house on land in the clearance area which does not belong to them, where it is let to them for temporary housing purposes pursuant to a provision included in the clearance order to that effect (*r*);

(v) license the house for temporary housing accommodation, in any case where the clearance order has been made before the commencement of the 1954 Act (*s*).

These powers will all be subject to the approval of the Minister in each case, if the local authority are to obtain the benefit of an

(*n*) Local Government (Miscellaneous Provisions) Act, 1953, s. 11 (1), amending Housing Act, 1949, s. 2.
(*o*) 1954 Act, s. 2 (1), and see note (*g*), *supra*.
(*p*) 1954 Act, s. 2 (2).
(*q*) *Ibid.*, s. 2 (3).
(*r*) *Ibid.*, s. 4.
(*s*) *Ibid.*, s. 6, and compare demolition order procedure, *supra*; the same conditions apply.

exchequer subsidy towards the cost of operating the Act (*t*), and as the Minister has said (*u*) that no deferred demolition proposals will be approved in areas where all slum houses could be demolished and replaced within a period of five years, it seems that these provisions of the Act may not be used in practice so generally as might at first appear.

(C) Miscellaneous Matters

Apart from the two main subjects above discussed, Part I of the new Act (supplemented by Part III) makes a number of miscellaneous amendments to the law of housing and of compulsory purchase of land.

(a) *Definition of "unfit for human habitation"*

In section 9 of the 1954 Act, an attempt is made to define the expression "unfit for human habitation," as it appears in several places in the Housing Act, 1936, notably in section 2 (obligations of landlords), section 9 (repairs notices), section 11 (demolition orders), section 12 (closing orders), and section 25 (clearance areas); the definition of "sanitary defects" in section 188 (1) of the 1936 Act is repealed, as is the reference in section 188 (4), *ibid.*, to the building by-laws, which was formerly one (*a*) of the standards to be applied in determining whether a particular house was fit or unfit. Under the new Act, when determining this question, regard must be had to the condition of the house in respect of repair, stability, freedom from damp, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for storage, preparation and cooking of food and for the disposal of waste water. Moreover, it is provided that a house will be unfit "*if and only if*" it is so far defective in one or more of the said matters that it is not reasonably suitable for occupation in that condition. In future, the standard may be a little clearer than it was under the provisions of the 1936 Act itself, but it certainly seems that advocates will have far more fuel for arguments against the local authority on appeals or local inquiries when this question is in dispute.

(b) *Remedy for lessees*

By section 10 of the 1954 Act, where a lessee has incurred expenditure in compliance with a repairs notice served under section 9 of the 1936 Act, or has had to repay expenses of the local

(*t*) 1954 Act, s. 7.
(*u*) Ministry of Housing and Local Government Circular 30/54.
(*a*) And not the only one: *Birchall* v. *Wirrall U. D. C.* (1953) 117 J.P. 384.

authority which they have incurred in acting under section 10, *ibid.*, in default of compliance by the "person having control" with a section 9 repairs notice, he may recover such part of that expenditure (or repayment) from his lessor as the local county court may determine to be just having regard to all the relevant circumstances.

(c) *Houses let in lodgings*

The former power of regulating tenement and other houses let in lodgings by way of local by-laws (*b*), has been replaced by a general provision, in section 11 of the 1954 Act, empowering any local authority to require works to be carried out, or the taking of specified action, in order to secure the limitation of the number of persons, or of households, accommodated in particular premises. The local authority are not empowered to act in default of compliance with any such requirement, but non-compliance amounts to an offence for which the local authority may prosecute.

New powers for the abatement of overcrowding (*bb*) in houses let in lodgings are given by section 12, under which the local authority may serve a notice on the occupier or on any person having control of the premises, stating the maximum number of persons by whom, in the authority's opinion, any room on the premises should be occupied as sleeping accommodation. There is a right of appeal against such a notice under section 15 of the 1936 Act, but non-compliance therewith is made an offence.

(d) *Procedural Points*

Changes in procedure have been introduced by the 1954 Act as follows:

(i) Notices relating to compulsory purchase under Part III of the Housing Act, 1936 (*c*), to compulsory purchase under section 16, *ibid.*, to compulsory purchase under section 3 of the 1954 Act, or to a clearance order under Part III of the 1936 Act, may be served by addressing them to the owner, lessee or occupier by that description, or by affixing a particular notice to a conspicuous part of the premises affected (*d*);

(ii) As an alternative to the holding of a public local inquiry in the case of clearance order, or of a compulsory purchase

(*b*) Housing Act, 1936, ss. 6–8, now repealed.

(*bb*) This expression is *not* here to be understood in the technical sense of Part IV of the Housing Act, 1936.

(*c*) The Acquisition of Land (Authorisation Procedure) Act, 1946, does not apply to these cases.

(*d*) 1954 Act, s. 14, and First Schedule thereof, para. 1.

order under Part III of the 1936 Act, the Minister may hold a private hearing, as he may in the case of a compulsory purchase order made under the Acquisition of Land (Authorisation Procedure) Act, 1946 (*e*);

(iii) If entry on land in course of acquisition is desired before completion, the shortest permissible notice required to be given under section 145 of the Housing Act, 1936, has been reduced to fourteen days (*f*). As an alternative, in the case of a *house*, which the local authority have been authorised to purchase compulsorily, they may serve a notice on the person in actual possession, authorising him to remain in occupation on the local authority's terms, and the local authority will then be deemed to have taken actual possession of the house (*g*);

(iv) In future, statutory tenants holding over under the Rent Acts are to be treated, in all cases of compulsory purchase (*h*), as if they were tenants for a period less than a month (*i*), and therefore they will not be entitled to receive a copy of notices required to be served on owners, lessees, etc., in the various stages of compulsory purchase procedure, or, it seems, of notices to treat (*k*).

(D) Conclusion

By section 22 (3) of the 1954 Act, Part I thereof is to be construed as one with the 1936 Act, and the procedural provisions as to the signature and service of notices, etc., contained in the 1936 Act (*l*), will therefore apply thereto. On the other hand, although references in the 1954 Act to a demolition order are to include references to a closing order made under section 10 or section 11 of the Local Government (Miscellaneous Provisions) Act, 1953, it is not provided, in either the 1953 or the 1954 Act, that the said section 10 or section 11 shall similarly be construed as one with the 1936 Act.

The Housing Repairs and Rents Act, 1954, was given the Royal Assent on July 30, 1954, and therefore came into operation on August 30, 1954 (*m*).

(*e*) *Ibid.*, First Schedule, para. 2.
(*f*) *Ibid.*, First Schedule, para. 3.
(*g*) *Ibid.*, s. 14 (3).
(*h*) And in certain cases of orders made under the National Parks and Access to the Countryside Act, 1949 (see First Schedule thereto).
(*i*) 1954 Act, s. 50.
(*k*) This provision reverses the effect of the uncomfortable—to an acquiring authority—decision in *Brown* v. *Minister of Housing and Local Government* [1953] 1 W.L.R. 1370.
(*l*) See sections 164–167 thereof.
(*m*) 1954 Act, s. 54 (2).

Part II

Yet Another Rent Act

By Ashley Bramall, Barrister-at-Law

Part II of the Housing Repairs and Rents Act, 1954, which comes into force on August 30, adds another twenty-seven sections and three Schedules to the Rent Acts, making many amendments, mainly of detail, to the Acts of 1920, 1923, 1933, 1939 and 1949. Its objects are to provide landlords with rents adequate for keeping property in repair and to make more attractive the construction and conversion of houses and flats to let, while retaining control for existing dwellings.

The scope of the changes is wide, covering the extent and application of the Acts, recoverable rents, premiums and security of tenure. An interesting feature is a definition, for the first time, of the phrases "statutory tenant" and "statutory tenancy." "Statutory tenant" is defined by section 49 (1) as "a tenant (as defined by section 12 (1) (g) of the Act of 1920) who retains possession by virtue of the Rent Acts and not as being entitled to a tenancy." The Act also introduces the term "controlled tenancy," meaning "a tenancy to which the Act of 1920 applies," which does not make clear whether it is synonymous with a contractual tenancy or also embraces a statutory tenancy; but its use indicates that a contractual tenancy is meant.

Exemptions from the Acts

The Act ends the process by which new dwellings were automatically controlled, by exempting all dwellings of which the construction is completed after the commencement of the Act, and all separate and self-contained premises produced by a conversion completed after the same date, provided it was not carried out with the assistance of a grant under the Housing Act, 1949 (section 35). It is thus hoped to encourage the building of houses to let and the conversion of houses into smaller units. What are "separate and self-contained premises" and what is meant by "conversion"? The decisions in *Smith* v. *Prime* (1923) 129 L.T. 441 and *Darrall* v. *Whittaker* (1923) 129 L.T. 672 on the similar provisions of section 12 (9) of the Act of 1920 show that no outer door or partition is required to make premises self-contained, but that all the rooms must be together and not scattered about the house. In *Darrall* v. *Whittaker* McCardie J. said that the flat must

" contain within itself provision for the living and sleeping of a man and his family," but in *Smith* v. *Prime* it was held that the sharing of a lavatory or bathroom did not prevent two flats from being self-contained.

The meaning of " converted " is suggested by the difference between section 35 and section 2 (9) of the Act of 1920. The latter required that a house should be " bona fide reconstructed by way of conversion." The omission of " reconstructed " from section 35 indicates that a less radical alteration is required. It is submitted that anything done to render a part of a house " separate and self-contained " will take that part outside the Acts.

Exemption for public and semi-public bodies

The Act recasts the exemption from the Rent Acts enjoyed by local authorities and extends it to new town development corporations and certain housing trusts and associations (section 33 (1)). To qualify for exemption a housing association must either not trade for profit or be prohibited from paying more than 5 per cent. interest and must either be registered under the Industrial and Provident Societies Acts with the provisions of the premises concerned as part of its main object, or show that they were provided by agreement with the local authority (section 33 (2)). Thus a co-operative society, owning houses for investment, will not qualify unless the house concerned was provided by agreement with the local authority. A housing trust must be a charitable body, devoting the whole or substantially the whole of its funds, including any surplus, to housing, either under its constitution or as a matter of practice (section 33 (9)), so that a parochial charity which owns and lets houses to assist the poor will not qualify.

The exemption now extends only to lettings by the authorities themselves and not to the premises. As far as local councils are concerned there are two changes. Lettings of dwellings built before February, 1919, previously subject to the Acts except for the council's power to obtain possession, are now taken completely outside the Acts, as are previously controlled houses held for other than housing purposes (*e.g.*, pending road widening). On the other hand the former complete exemption of houses built since February, 1919, is now confined to lettings by the local authorities themselves, so that subtenants will be fully protected against their own landlords.

Special provisions are applied to tenancies controlled or decontrolled by these changes. Decontrol is not to apply to existing

tenancies until six months after the Act comes into force (section 33 (1) (3)). Tenants enjoying protection for the first time, who have had orders or judgments made against them before the Act, but not executed, may apply to the court for reconsideration of their cases (section 33 (6) (a)).

Newly controlled tenancies are brought within the Acts under an entirely new type of control. The standard rent applicable to a subtenancy created by a tenant of an exempted authority will change according to the rent charged by the authority. The Acts are to apply as though the superior tenancy were controlled and the rent charged for the time being the standard rent (section 33 (5)). For other tenancies newly brought under control (*e.g.*, tenancies under the Housing (Rural Workers) Acts) the basic date for standard rents and other calculations is November 11, 1953, instead of August 3, 1919, or September 1, 1939 (section 33 (6) (b)).

Security of Tenure

The only change of policy with regard to security of tenure is the abolition by section 43 of the procedure for obtaining possession on a certificate from the County Agricultural Executive Committee that the house is required for an agricultural worker. It will still be possible to obtain possession from a former employee for this purpose, but not from anyone else, unless alternative accommodation is offered.

In *Cow* v. *Casey* [1949] 1 K.B. 474 it was held that a subtenant was not protected against the head landlord, if his immediate landlord was tenant of a property outside the rateable value limits of the Acts, since section 15 (3) of the 1920 Act only protects a subtenant of a "tenant of a dwelling-house to which the Act applies." Section 41 provides that the Acts are to apply from the determination of the superior letting as though it had been two separate lettings, one of the part sublet and the other of the remainder. Consequently the tenancy and subtenancy of the sublet part both come within the Act. It appears that a subtenant of a small residential part of large business premises will now be protected against the head landlord, since one of the tenancies into which the head tenancy will be notionally divided will be of a dwelling-house and not of business premises. The decision in *Knightsbridge Estates Trust, Ltd.* v. *Deeley* [1950] 2 K.B. 228, where the subtenant of part of premises let at less than two-thirds their rateable value was similarly held to be unprotected, is unaffected by this section, but reversed by the Landlord and Tenant Act, 1954.

The decision in *Tinkham* v. *Perry* [1951] 1 K.B. 547 disclosed that if a tenant left a widow who was not living with him at his death, this prevented any member of his family from carrying on his statutory tenancy. This is now altered by section 42, which amends the phrase in section 12 (1) (g) of the Act of 1920 qualifying the right of a member of the tenant's family to succeed, from "where a tenant leaves no widow or is a woman" to "where a tenant leaves no *such* widow . . . ," meaning no widow residing with him at the time of his death.

Repairs Increases

The most discussed sections are those instituting the "repairs increase." The intention is to provide landlords with sufficient rent to ensure that houses are kept in repair, without giving them extra profits. The Government rejected a percentage increase because of the great disparity in existing rents; instead they have introduced an increase related to the Statutory Repairs Deduction allowed, in assessing rateable value, for the landlord's presumed repairing obligation. It was argued that this fairly represented the 1939 cost of repairs and that this cost had arisen 216 per cent., so that landlords would be in approximately the same position if increases in rent were permitted equal to twice the deduction. The deduction itself does not normally benefit the landlord, since he is not usually responsible for rates, but presumably the argument is that a free contractual rent in 1939 would include this amount for repairs.

The increase of twice the statutory deduction is a maximum subject to many qualifications. There are four categories of house to which the increase is not applicable (section 23 (3)), broadly those let under circumstances which permit review of the rent either by a Rent Tribunal or by the local authority. The most important are those with standard rents fixed by reference to lettings after September 1, 1939, for which a Rent Tribunal can determine a reasonable rent. By section 36 of the present Act this is now to displace the standard rent even though it results in an increase. Other categories are those houses for which the local authority has power to fix rents, namely those improved or converted with grants under the Housing Act, 1949, those sold by local authorities under the Housing Act, 1952, and those controlled because the reversion has ceased to belong to an "exempted authority" (see p. 381 *supra*, and p. 389 *infra*).

Provided the house is not in one of these groups the landlord can obtain an increase only if four conditions are satisfied (23 (1)):

(1) The landlord must be wholly or partly responsible for repairs;

(2) the house must be in good repair;

(3) the house must be reasonably suitable for occupation;

(4) the landlord must make a declaration that repair work of a certain value has been carried out.

Liability for repair

The first condition does not relate to contractual liability for repair, but to a notional liability created by the Act. The landlord is deemed to be liable for all repairs which are not the contractual liability of the tenant (section 30 (1)). If the tenant has some contractual liability the landlord is only entitled to a proportion of the increase (section 23 (2)), to be determined either by agreement in writing between the landlord and tenant or by the county court (section 23 (5)).

Good repair

Good repair, which applies to both structure and decoration, is not an absolute standard, but regard has to be had to the age, character and locality of the premises. This resembles the definition of "good tenantable repair" in *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42 as "such repair as, having regard to the age character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it." Where there is more than one dwelling-house in a building none of them is to be considered in good repair unless the entrance, staircase and other parts which the tenant requires to use are in good repair (section 31 (2)).

The landlord may limit his obligation in respect of repair by serving on the tenant a notice to ignore internal decorative repair, provided there is no contractual liability for such repair on either party (section 30 (3)). No account is then to be taken of the internal decoration of the house, or any other premises, in deciding whether it is in good repair, the value of the work which must have been done on the house is reduced by one third and the amount of the repairs increase is similarly reduced.

In judging "good repair" defects due to the act, neglect, default or breach of express contract of the tenant or anyone claiming under him are to be ignored, except when a local authority is considering whether to grant or revoke a certificate of disrepair (section 31 (1)).

Suitability for occupation

Suitability for occupation is only to be judged by the tests prescribed by section 9 for determining fitness for habitation, excluding repair. These are stability, freedom from damp, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for storage, preparation and cooking of food and for the disposal of waste water.

Previous repair work

The value of work carried out on the house must be three times the statutory deduction in a period of twelve out of fourteen months preceding the notice of increase (Schedule 2, paragraph 1). Until December 30, 1954, the landlord may show that work to the value of six times the deduction was carried out in a period of three out of the last four years (Schedule 2, paragraph 2). With a house in London of gross value £30 the value of the work must either be £30 in one year or £60 in three years. This condition has only to be complied with once, but conversely a second instalment of repairs will not qualify for a second increase; once the rent exceeds the existing recoverable rent by the amount of the increase, section 23 (1) is spent.

Repair work excludes improvements and structural alterations (section 49 (1)). The landlord may include all work done on the dwelling-house or solely for its benefit (Schedule 2, paragraph 7), except work paid for by a tenant or subtenant or by the War Damage Commission (paragraph 8). Work for the benefit of more than one house is to be apportioned, subject to special provisions for flats (paragraph 7), which appear to produce consequences which can hardly have been intended. When a building contains two or more dwelling-houses, the landlord may aggregate all work carried out "either on the building or so as to enure solely for the benefit of premises comprised in the building," and divide it among the dwelling-houses in proportion to their statutory deductions. It is difficult to see how shops, offices or a flat occupied by the landlord himself can be excluded and it seems that tenants may have their rents increased when no work has been done on or for their flats or indeed on any residential premises.

The "Stopper"

The right to the maximum increase is further limited by what has been termed the "stopper," namely the figure of twice the gross value. No increase can be charged which will bring the "net" rent above this figure (section 24 (1)). The net rent is obtained by deducting from the rent paid any payment for rates,

any charge for furniture or services and any increase for improvements (section 24 (3)). A deduction for furniture or services must either be agreed in writing or determined by a Rent Tribunal, although there does not appear to be any statutory authority for a Tribunal making such a determination. If the net rent plus the repairs increase does not exceed twice the gross value the landlord can recover the full increase. If it does, he can only recover as much as will bring it up to that figure. If the net rent is already twice the gross value no increase can be charged.

Repairs Increase and Contract

The rent increases under the Act of 1920 only applied if the landlord was entitled to possession and the tenant was relying on the Act (*Kerr* v. *Bryde* [1923] A.C. 16); a contractual tenancy had to be ended before the increases could be charged. Under the present Act, however, the increase is to be added to the " rent which apart from this subsection would be recoverable from the tenant under the terms of the tenancy or statutory tenancy and having regard to the provisions of any enactment " (section 23 (1)), and may, therefore, be recovered in spite of a subsisting contractual tenancy.

Notice of Increase

Before charging the increase the landlord must serve on the tenant, or a prospective tenant, a notice in the prescribed form (section 25 (1)), naming a date, not earlier than six clear weeks (except in the case of the prospective tenant), on which the increase will take effect (section 25 (2)). The notice must be accompanied by two declarations, one that the house is in good repair and reasonably suitable for occupation, the other that a certain amount of repair work has been done (section 25 (1)). A wilfully or recklessly false statement in the latter is punishable by a fine not exceeding £30 (Schedule 2, paragraph 6). It appears from decisions on the Act of 1920 that a landlord who is only entitled to a proportion of the increase cannot serve a valid notice until the proportion has been determined (*Bourne* v. *Litton* [1924] 2 K.B. 10). The court has power to correct any error or omission in a notice which would otherwise invalidate it if satisfied that it was due to a bona fide mistake (section 25 (4)).

Challenging the Increase

If the tenant considers that the amount of work mentioned in the landlord's declaration is not that required by the Act or that the amount claimed has not been done, he may apply to the county

court within twenty-eight days of service of the notice for a certificate which, if granted, renders the notice void *ab initio* (Schedule 2, paragraph 4). If he fails to apply he and his successors are debarred from raising the defence in subsequent proceedings (Schedule 2, paragraph 5).

If the tenant disputes that the house is in good repair and suitable for occupation he may apply to the local authority for a certificate of disrepair (section 26 (1)). If this is granted the landlord is not entitled to the repairs increase, or to the 40 per cent. increase under the Act of 1920, from the date of the application (section 26 (2) and section 27). The landlord can do the work and apply to the local authority for revocation of the certificate (section 26 (4)) or sue the tenant and prove that when the certificate was given the conditions were fulfilled (section 26 (1)). The court must then cancel the certificate, rendering it void *ab initio*, unless it considers that the landlord delayed unreasonably in suing and prescribes some later date on which the certificate is to cease to be effective (section 26 (3)). A landlord who has applied unsuccessfully for revocation may similarly prove that the refusal to revoke was wrong and the court may cancel the certificate with effect from any date after the application for revocation (section 26 (5)). Inconvenience may well arise from the two different tests of good repair under section 31 (1) (see p. 384, *supra*). The local authority, ignoring the tenant's responsibility for the disrepair, may grant a certificate and the tenant withhold the increase; the court, taking it into account, may annul it and render the tenant retrospectively liable for rent withheld.

Subtenants

In addition to recovering a repairs increase from his subtenant in his own right as landlord, a tenant may pass on to the subtenant a "just proportion" of any repairs increase which his landlord is entitled to recover from him (section 28 (1)), but the total recovered from the subtenant must not bring his rent to more than twice the gross value of his dwelling-house. In order to pass on a proportion of the increase the tenant must serve a two weeks' notice, which need not be accompanied by any declarations (section 28 (5) (6)). It will be seen that no opportunity need be given to the subtenant to challenge the head landlord's declaration with regard to repair work.

Increases for Rates

Section 44 (1) amends the provisions for increasing rents on account of increases in rates. Late receipt of a rate demand may

cause a landlord to serve a notice of increase on a tenant after the rating period has begun. Previously he could not recover the increase for any time already past. Now he is permitted to recover it for any period up to six weeks before the date of operation of his notice during which the tenant was a statutory tenant. He cannot, however, recover the increase for more than the number of weeks in a rating period, if the next rate shows a reduction, in spite of the provisions of section 12 (1) (d) of the Act of 1920, that the increased rate is deemed to be payable until the next rate is demanded (section 44 (2)).

Determination of rents by Rent Tribunals

The provisions of section 1 of the Landlord and Tenant (Rent Control) Act, 1949, constituting a reasonable rent determined by a Rent Tribunal the standard rent, when the reasonable rent is less than the standard rent, is now extended by section 36 to cases where the reasonable rent exceeds the standard rent. A landlord of a house of which the standard rent is determined by a first letting after September 1, 1939, can now get the rent increased in this way, provided that the house is not one for which the local authority has power to fix a rent (see *infra*). He may also take advantage of a Rent Tribunal determination made before the commencement of the Act by giving the tenant a four weeks' notice of increase (section 36 (2)).

Rent Tribunals may also increase rents of houses let on or before September 1, 1939, in respect of increased costs of services provided by the landlord, whether or not he is required to provide them under the tenancy (section 40 (1)). The landlord may increase the rent on account of the increased cost since September 1, 1939, if authorised to do so either by a Rent Tribunal determination or an agreement in writing with the tenant, made in either case after the commencement of the Act. Where the increase is obtained on account of services provided without contractual obligation, so that the tenant has no redress if they are discontinued, the "transfer of burden" provisions of the Act of 1920 apply, so that any curtailment or discontinuance will entitle the tenant to a reduction of rent (section 40 (3)).

Rents fixed by local authorities

By section 37 the local authority is to fix a maximum rent, which is to become the standard rent, for any controlled house improved or converted with the assistance of a grant under the Housing Act, 1949, unless a rent has already been determined by a Rent Tribunal before approval of the grant. If the new standard

rent is higher than the old this will override any contractual rent, and the landlord must give one clear week's notice to increase (section 37 (3)).

Where premises have previously been exempted from the Acts because the reversion belonged to an "exempted authority" and it has now ceased to belong to such an authority, without there being any controlled or statutory subtenancy of the whole premises, the local authority must determine a standard rent at which the premises are to become controlled, if asked to do so by any person having an interest in them or proposing to acquire one (section 34).

Premiums

Originally the Bill dealt with the anomaly under the Landlord and Tenant (Rent Control) Act, 1949, that while a proportionate premium can be recovered on an assignment, when a premium has been legally paid before June 2, 1949, on the grant of the tenancy, no such premium can be recovered when a premium was equally legally paid on a previous assignment. The clause was, however, deleted and replaced by section 38, which provides that a premium may be charged on any assignment of a tenancy granted for more than twenty-one years, whether or not a premium was previously paid. The exemption extends to any tenancy which is granted after the expiry of such a tenancy to the same tenant. This will remove the anomaly in some cases, but will not affect tenancies granted for twenty-one years or less on which a premium was legally paid on an assignment before June, 1949.

Postscript

It will be seen that the provisions of the Act are complicated and sometimes obscure. This is almost inevitable since they amend a system which is already complicated enough. Even before this Act there were, including the Furnished Houses Act of 1946, no less than nine Rent Acts still in force. The addition of a tenth, the longest yet, will cause many to hope that Parliament may find time to pass a single consolidating enactment.

HOW TO STARVE AN ESTOPPEL

By Niul Hogg, Barrister-at-Law

The doctrine of Tenancy by Estoppel is an old one, though, as Harman J. remarked in *Coventry Permanent Economic Building Society* v. *Jones* [1951] 1 All E.R. 901, it is none the worse for that. As long ago as 1845 it was said by Martin B. in *Pargeter* v. *Harris* 7 Q.B. 708 at p. 754 : " There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground. . . ." It follows from this that, if in due course the lessor acquires a legal estate sufficient to ground the lease, a legal term of years thereby becomes vested in the lessee binding on the lessor and on all persons claiming through the lessor subsequent to its creation. The estoppel, as it is said, is fed by the legal estate.

This situation has been before the courts on a number of occasions in recent years. Six of these cases have been reported, beginning with the *Coventry* case (*supra*), continuing with *Woolwich Equitable Building Society* v. *Marshall* [1952] Ch. 1, *Universal Permanent Building Society* v. *Cooke* [1952] Ch. 95, *City Permanent Building Society* v. *Miller* [1952] Ch. 840 and *Mornington Permanent Building Society* v. *Kenway* [1953] 1 All E.R. 951, and culminating in *Church of England Building Society* v. *Piskor* [1954] 2 W.L.R. 952. In each of these cases, although there were individual variations, the pattern of the facts was as follows : P contracted to buy a house from V; P negotiated for a loan from M in order to be able to meet the purchase-money and agreed to mortgage the house as security, the mortgage to exclude the mortgagor's statutory powers of leasing; P was let into possession in advance of completion and purported to grant a weekly tenancy to T; completion took place and some time later P defaulted on the mortgage payments; M sued for possession and T claimed the protection of the Rent Acts.

It is, of course, the existence of the Rent Acts that makes this particular application of the doctrine of any importance. It was held in *Dudley & District Benefit Building Society* v. *Emerson* [1949] Ch. 707, that a lease or tenancy granted by a mortgagor, whose statutory powers of leasing were excluded by the terms of his mortgage, was not protected by the Rent Acts. If, however,

the tenancy were granted before the mortgage, the mortgagee would be bound by it, since he cannot have a better title than the mortgagor through whom he claims, and the tenant would have the protection of the Rent Acts. In all these cases, therefore, the tenant is concerned to show that his tenancy, which originally was only equitable, has ripened into a legal estate before the creation of the mortgage.

In the *Coventry* case this claim was not sustained. Harman J. held that conveyance and mortgage were in substance one transaction and he declined to predicate a *scintilla temporis* during which an unincumbered legal estate was vested in the purchaser so as to feed the estoppel and create a legal tenancy in priority to the mortgage, whereby the mortgagee would be defrauded.

In the *Woolwich* case Danckwerts J. found himself able to distinguish the *Coventry* case on the facts. The mortgage contained a recital that the mortgagor was the estate owner of the property mortgaged. The transfer, therefore, must be taken to have had effect prior to the completion of the mortgage and the necessary *scintilla temporis* was thus established. In the *Universal* case also the Court of Appeal was able to distinguish the *Coventry* case because the mortgage was dated the day after the conveyance and there was no evidence to suggest that the two deeds constituted one transaction, but the court expressly left open the question of principle whether conveyance and mortgage could ever be regarded as one indivisible transaction with no moment of time between them.

Before considering this aspect of the matter further it is necessary to go back to look at an alternative way in which the tenant's claim was put in the three cases just considered and on which the decisions in the next two cases rest. This is that in each case the mortgagee was alleged to have had notice of the rights of the tenant, whatever the nature of those rights might have been, and was, therefore, bound by them. If the rights of the tenant, so to call him, include the right to have a valid legal tenancy executed in his favour as soon as his lessor or a person claiming through him is in a position to do so, a mortgagee from the lessor with notice thereof would be bound by that right, since he claims through the lessor, and would be unable to get possession against the tenant.

In the *Coventry* case the tenant claimed under a written contract for the grant of a tenancy and it was held that this was an estate contract which, not being registered under the Land Charges Act, 1925, was void against the mortgagee. It would seem probable that an implied right of the tenant to have a legal tenancy granted should also be registered as an estate contract. In the *Universal* case

Romer J., at first instance, held the contrary; but the Court of Appeal decided the case on different grounds, and Jenkins L.J. said that "that part of the learned judge's judgment should not be regarded as authoritative." The position was different in the *Woolwich* case, because there the property was registered land to which these provisions of the Land Charges Act, 1925, do not apply (see section 23 (1)). It was held that the rights of the tenant, being a person in possession, were protected as an overriding interest under section 70 (1) (g) of the Land Registration Act, 1925. The same result was achieved in the *Mornington* case, where Vaisey J., although holding that there was no *scintilla temporis*, nevertheless held that the tenants' rights were protected as overriding interests under section 70 (1) (g). In the *City* case, however, the facts were somewhat different as the tenant did not go into possession until after the transfer and charge had been completed by registration. She claimed, therefore, under section 70 (1) (k), but, since her term was for more than three years and it had not been created under seal, she failed.

Whether the rights protected under section 70 (1) (g) include the right to have a legal tenancy granted or whether such a right should be protected by caution or by notice on the register remains doubtful, notwithstanding the decision in the *Mornington* case (see the remarks of Sir Raymond Evershed M.R. in the *City* case [1952] Ch. 840, at pp. 849 and 850). But, however it may be protected, this is a right against the lessor and persons claiming through him and depends for its efficacy on the contract for sale, a contract which the tenant himself cannot enforce. If, for example, the contract for sale should go off and the vendor sell to another, that other would not be bound by such a right. And the same would be true in unregistered conveyancing, even though the tenant's contract were registered as a land charge.

To return to the question of principle, whether conveyance and mortgage can ever constitute one transaction with no *scintilla temporis* between them, this has now been decided, in the tenant's favour, by the Court of Appeal in the *Church of England* case. The observations of Harman J. in the *Coventry* case were disapproved and it was said that the decision in that case could only be upheld on the ground of fraud, in which the tenant must be taken to have been implicated. The statement of the principle appears clearly in the following quotation from the judgment of Romer L.J. [1954] 2 W.L.R. 952, at p. 960:

> "The theory that a purchase which is completed by payment of money which has been provided in part by a third

party, and a mortgage by the purchaser of the property sold to secure the repayment of that money to the lender, constitutes only one transaction if the instruments are executed at more or less the same time is a conception which has a prima facie appeal, but it does not, on analysis, in my opinion, truly reflect the legal effect of what takes place. The mortgage of the purchased property cannot have any operation in law (whatever rights it may give rise to in equity or estoppel) unless and until the purchaser is in a position to vest a legal term in the property, as security, in the mortgagee, and he is not and cannot be in a position to do this until he himself has acquired from the vendor the legal estate out of which the mortgage term is capable of being created. From this it follows that the execution and delivery of the conveyance (if the property is freehold) or of the assignment (in the case of a leasehold) by the vendor to the purchaser must of necessity constitute an essential preliminary to the vesting in the mortgagee of a subsidiary interest in the property. Mr. Lightman [for the building society] pressed upon us the necessity of looking at the substance rather than the form of the transaction which took place in the present case and referred us to [authorities] in support of that proposition. I am very willing to do so, but the substance of the transaction was that the purchasers were to purchase property with money lent in part by the building society and give the society a mortgage on the property for the loan. All this has in fact been done and the society has got its security but, look at it how one will, the fact remains that the purchasers could not have given the society the legal charge which the society required unless, at the time when the charge was executed, the purchasers were the owners of the legal interest in the property charged. That this was recognised by the society itself is sufficiently shown by the fact that there appears in the schedule to the charge the statement that the premises were then (that is to say at the moment of the delivery of the charge) vested in the mortgagors—a circumstance of evidence upon which Danckwerts J. relied in [the *Woolwich* case]. I agree with Danckwerts J. that the plaintiffs having inserted that statement in the charge, cannot very well complain if the statement is regarded as true. Even without this element, however, I should still regard the legal interest in the purchased premises as having become vested in the purchasers prior to the execution of the charge for, as I say, unless this sequence of interests is observed the charge would

have been wholly ineffective in law to achieve its immediate purpose. I agree with Mr. Alcock's submission [for the tenant] that a composite transaction cannot be regarded as being one transaction, unless it is not only one but one and indivisible; and that two transactions, each possessing a legal individuality of its own, do not coalesce into one merely because they are dependent on each other. . . .

"To the extent, then, that the view which Harman J. acted upon in the *Coventry* . . . case was founded on the principle that in cases such as the present the conveyance and the mortgage are to be regarded as one transaction, I do not, for myself, now that the matter has been so fully argued before us, feel able to accept it."

The question that now arises is, how can a mortgagee best protect himself against this impairment of his security? To this, I think, the only sure answer is for the mortgage to be made not by the purchaser after conveyance but by the vendor and for the property then to be conveyed subject to the mortgage. In this way there would be no *scintilla temporis* during which the purchaser could hold an unincumbered legal estate. The legal estate which he would get would be encumbered from the word "go"; his powers of leasing would always be restricted; and the estoppel would, as it were, die of starvation. I am fortified in this view by the remarks on this topic in the "Obiter Dicta" in the issue of the *Law Journal* for April 9, 1954, and by the article by the "Conveyancer" in the issue of the *Law Times* for May 28, 1954, where in each case the same conclusion is reached. Moreover, this device would also prevent the mortgagee from being prejudicially affected with notice of the tenant's right to have a legal tenancy granted to him, even if this right were protected as an overriding interest or by registration as a land charge.

There are three ways in which this may be achieved. The first and, I think, the best, is for the vendor to make an ordinary straightforward mortgage, or charge by way of legal mortgage, to the mortgagee, including covenants for payment of principal and interest and all the usual mortgagor's covenants and, of course, excluding the mortgagor's powers of leasing. This is followed by a conveyance made between vendor, mortgagee and purchaser by which, after reciting the vendor's seisin subject to the mortgage, the mortgage itself, the agreement for sale and the mortgagee's agreement to join, the vendor conveys the property to the purchaser subject to the mortgage, the mortgagee releases the vendor personally from his covenants in the mortgage and the purchaser

covenants with the mortgagee to perform the mortgagor's covenants in the mortgage and with the vendor to indemnify him against their breach (*a*). Where the land is registered the transfer, although not in quite the same form as the conveyance just described, can be made to achieve the same purposes (*b*). A memorandum of the conveyance, or of the transfer as the case may be, should be endorsed on the mortgage for the greater protection of the vendor.

The second method is for the mortgage to be the tripartite deed, followed by a simple conveyance or transfer subject thereto. By this mortgage, after the recital of the vendor's seisin, the agreement for sale and the agreement for loan, the purchaser charges his equitable interest and enters into the usual mortgagor's covenants, including those for payment of principal and interest, the vendor, at the request of the purchaser, mortgages the legal estate (giving no covenants beyond those implied by his assuring as trustee (*c*)) and all parties join in excluding the mortgagor's powers of leasing (*d*). Such a form is equally suitable for registered land, but care must be taken to negative the implications of section 28 (1) of the Land Registration Act, 1925 (*e*). It is not necessary to apply for an actual entry of this to be made on the register since Rule 140 of the Land Registration Rules, 1925, provides that registration of the charge itself shall be sufficient entry. Under this second method, however, the mortgagee can, in some measure, be said to derive his title through the purchaser. If, therefore, it should be considered that the tenant's overriding interest includes the right to have a legal tenancy granted, it would be safer to use the first method lest the mortgagee be bound by this right.

Finally, the mortgage and conveyance may be combined in one deed. A precedent of such an instrument is to be found in the *Encyclopaedia of Forms and Precedents*, Third Edition, Volume 10, at page 323. A combined transfer and charge is not, however, a satisfactory form for registered land. Moreover, the same objections in regard to the tenant's overriding interest apply to this method as to that last described. A word of warning may be added concerning the alternative method suggested in note (*q*) to this precedent, namely that the same result may be achieved by a

(*a*) A precedent by Mr. Hogg of such a conveyance will be found on page 691.

(*b*) A precedent by Mr. Hogg of such a transfer will be found on page 693.

(*c*) The vendor will, as a rule, object to giving the unqualified "beneficial owner" covenants for title.

(*d*) A precedent by Mr. Hogg of such a tripartite mortgage will be found on page 695.

(*e*) S. 28 (1) provides that a covenant on the part of the proprietor of the land at the time of the creation of the charge to pay the principal and interest shall be implied unless an entry to the contrary appears on the register.

reservation of the mortgage term under section 65 of the Law of Property Act, 1925. Notwithstanding section 65 it would appear that a reservation still operates by way of regrant; the section merely provides that such regrant need not be executed. If this be so, it will not be effective to defeat the rights of the tenant, for the mortgagee will be claiming through the purchaser and not directly through the vendor. In other words there will be a moment of time between the grant to the purchaser and the regrant of the term.

It should be understood that none of these methods is appropriate where the vendor wishes to impose new restrictive covenants on the sale, and these are given by the purchaser, for, unless the mortgagee derives his title through the purchaser, he will, on exercising his power of sale, be able to sell the land (whether it is registered or not) free of them (*f*).

(*f*) On this question, however, see the article by the "Conveyancer" in the issue of the *Law Times* for June 25, 1954.

THE LAW OF RATING

PART IV

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Rateable Value

General rule

As has been already noted (*ante*, p. 283), in the majority of cases the net annual value of a hereditament is also its rateable value. There are, however, two classes of exception to this general rule, deriving respectively from the Rating and Valuation Act, 1925, and from the Rating and Valuation (Apportionment) Act, 1928, and the Local Government Act, 1929: these must now be considered.

Exceptions: (1) *Rating and Valuation Act, 1925*

It is provided by section 22 (1) (c) of the Act of 1925 that in the case of hereditaments of the types listed in Part II of the Second Schedule to the Act further deductions shall be made from the net annual value. The hereditaments in question are:—

(i) Titles, title commutation, rentcharge and other payments in lieu of title, issuing out of any land.
(ii) Any land used as a railway constructed under the powers of any Act for public conveyance.
(iii) Any land used as a canal or as a towing path for a canal.
(iv) Any land covered with water.

Such hereditaments are, however, only entitled to further relief if situate in a county borough or urban district. Moreover, the Act does not apply to hereditaments within the administrative county of London.

Tithes: *railways*: *canals*

Since comparatively few tithes still exist, it is not proposed to comment upon this first class.

Railway and canal hereditaments which are occupied by the British Transport Commission are not liable for rates in the ordinary way (*a*), with the result that the second and third classes have largely

(*a*) Local Government Act, 1948, s. 85.

lost their importance. Railway and canal hereditaments not occupied by the British Transport Commission and entitled to relief under the Act will also in most cases be entitled to further relief as freight-transport hereditaments (*b*).

Land covered with water

Reservoirs are entitled to relief as land covered with water, but pipes and mains which carry the water are not so entitled (*c*).

Wet docks are also entitled to this relief, but not, of course, the adjacent wharves and other buildings (*d*). A hereditament is not entitled to relief merely because it is occasionally covered with water, even although such occasional flooding is necessary for its beneficial use. Thus in *Mersey Docks and Harbour Board* v. *Birkenhead Corporation* [1916] 1 K.B. 695, it was held that a dry dock which was only flooded for short periods on the admission and departure of vessels was not "land covered with water," because for the greater part of the time the dock was dry whilst repairs were done to the vessels.

The Amount of the Deduction

In those county boroughs and urban districts in which there has been a consolidation of rates by virtue of a local Act passed before the commencement of the Rating and Valuation Act, 1925 (December 22, 1925), there is to be deducted from the net annual value of the hereditaments entitled to relief a percentage equal to the relief given by the local Act. In all other cases the percentage is fixed by order made for such county borough and urban district under schemes prepared in accordance with Part III of the Second Schedule to the Act of 1925.

Saving of Exceptional Principles of Valuation

Section 64 (1) of the Rating and Valuation Act, 1925, preserves "any privilege or any provision for the making of a valuation on any exceptional principle" together with "any exemption from or privilege in respect of rating conferred by local Act or order on the occupiers of hereditaments in any particular part of a rating area or on the occupiers of any particular hereditaments." It is provided in section 64 (2) that schemes shall be prepared to secure the continued operation of any such privilege or exemption. When such a scheme provides for a deduction from net annual value, the rateable value will be the net annual value less such deduction.

(*b*) *Infra*, p. 413.
(*c*) *Southwark and Vauxhall Water Co.* v. *Hampton U. D. C.* [1900] A.C. 3.
(*d*) *Newport Dock Co.* v. *Newport Local Board of Health* (1862) 2 B. & S. 708.

Again, these provisions do not apply within the administrative county of London.

Exceptions: (2) *The Rating and Valuation (Apportionment) Act, 1928*

The Rating and Valuation (Apportionment) Act, 1928, and the Local Government Act, 1929, also provide that the net annual values of certain classes of hereditament shall be reduced in order to arrive at their rateable values. The process of reduction under these Acts is popularly know as " de-rating."

The Act of 1928 defines the classes of hereditament entitled to be de-rated and makes provision for them to be specially entered on the valuation lists. The Act of 1929 specifies the extent of the reduction to be made.

Three classes of hereditament are specified by the Act of 1928, namely,

(a) agricultural hereditaments,
(b) industrial hereditaments,
(c) freight-transport hereditaments.

As has been noted already, however (*ante*, p. 169), the Local Government Act, 1929 (*e*), conferred a total exemption from rates on agricultural hereditaments, with the result that only industrial and freight-transport hereditaments need now be considered.

Briefly the scheme of the two Acts is to reduce the rateable value of industrial and freight-transport hereditaments which are wholly used for industrial or freight-transport purposes to one quarter of their net annual value. Where an industrial or freight-transport hereditament is partially used for other purposes, it is provided that the net annual value shall be apportioned between the industrial and freight-transport purpose and the other purpose, and that only the portion of the net annual value which is attributable to the industrial or freight-transport purpose shall be reduced in calculating the rateable value.

A. *Industrial Hereditaments*

An industrial hereditament is defined by section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, as " a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway, or . . . as a factory or workshop." This definition is not, however, of itself sufficient since all its material terms are further defined elsewhere in the section. Before these detailed definitions are considered, it should be noted that

(*e*) s. 67 (1).

actual occupation and use is an essential element of the general definition : potential user is insufficient. Thus in *Yates* v. *Burnley Rating Authority* (1933) 97 J.P. 226 it was held that a fully equipped cotton mill which was closed owing to a trade depression was not to be rated as an industrial hereditament.

(i) *Mines*

The Act of 1928 adopts the definitions of the expression " mine " contained in section 122 of the Coal Mines Act, 1911, and in section 41 of the Metalliferous Mines Regulation Act, 1872 (*f*), but further provides that the expression " include any premises, place or works, whether below ground or above ground, primarily occupied and used for the purpose of draining or otherwise protecting from damage any mine or group of mines, or occupied and used for pumping or raising brine for the purpose of manufacture or sale from shafts, wells, springs or mines " (*g*).

The general effect of the compendious definition is that every type of mine is capable of being an industrial hereditament whatever the mineral excavated. Included in the mine are all shafts, levels, planes, machinery and works, both below and above ground. Also included are tramways and sidings above or below ground so long as they are " in and adjacent to and belonging to the mine " (*h*). In practice it does not usually matter greatly at what point the railway track ceases to be a siding and so part of the mine, because, as will be seen hereafter, it usually immediately becomes " a mineral railway " and ranks as an industrial hereditament on that account. The point of decision is therefore only of importance in marking the limits of the two types of industrial hereditament.

It is, however, specifically provided (*i*) that there shall not be included in any mine any part of the premises on which any manufacturing process is carried on which is not ancillary to the getting, dressing or preparation for sale of minerals. Any such place will, however, in all probability be " a factory or workshop " and so be entitled to be rated as an industrial hereditament. Where mining premises include such a factory or workshop it is not clear whether the mine and the factory should be shown in the valuation list as two separate hereditaments or as one. The point is only of importance if, owing to the provisions of section 3 (1) of the Act of 1928, the factory cannot be regarded as being occupied

(*f*) As amended by s. 19 (2) of the Mining Industry Act, 1920.
(*g*) s. 3 (4).
(*h*) s. 122 of the Coal Mines Act, 1911.
(*i*) s. 122 of the Coal Mines Act, 1911, and s. 19 (2) of the Mining Industry Act, 1920

for factory purposes (*k*), but the better view appears to be that they should be shown as two hereditaments (*l*).

Mines frequently extend into a number of parishes, so that its parts are separately assessed for the purposes of de-rating. However, it is provided (*m*) that where "two or more properties within the same curtilage, or contiguous to one another, are in the same occupation" and are for any reason treated as separate hereditaments for rating and valuation purposes, they shall nevertheless be treated as one hereditament. This provision does not apply to mines only, but also to mineral railways, factories and workshops.

(ii) *Mineral Railways*

A "mineral railway" is defined by section 3 (4) of the Act of 1928 to mean "a railway, tramway, or ropeway used primarily for the transport of minerals gotten from a mine, or from two or more mines, to a freight-transport hereditament or between any two such hereditaments or to any dock not being a freight-transport hereditament and in the latter case includes also such dock." It should be noticed that the definition does not require that the railway should be exclusively used for the transport of minerals, it is sufficient if it is primarily so used. It is implicit in the definition that a mineral railway ceases where a freight-transport hereditament begins. Where however, the railway carries the minerals to a distribution point which is not a freight-transport hereditament, such as a road transport centre, the railway is not a mineral railway within the definition. This, however, is subject to the exception that where the railway leads to a dock which does not happen to be a freight-transport hereditament, both the railway and the dock are to be treated as one hereditament constituting "a mineral railway."

(iii) *Factories and Workshops*

The third and most important class of industrial hereditament is the "factory or workshop." Its definition is, moreover, by far most complex. Basically in the Act of 1928, "the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920" (*n*). The Act

(*k*) *Infra*, p. 402.
(*l*) See Ryde on *Rating*, 9th ed., at p. 308.
(*m*) s. 3 (3) of the Act of 1928.
(*n*) 1928 Act, s. 3 (2). This subsection, as amended by the Local Government Act, 1929, s. 69, also contains special provision for self-employed occupiers; and as to parts of industrial premises used for repair and housing of road vehicles. As to the latter, *cf. Potteries Electric Traction Co., Ltd.* v. *Bailey* [1931] A.C. 151.

of 1928 does, however, provide that where a factory or workshop is primarily occupied and used for certain purposes specified in section 3 (1) it is not to rank as an industrial hereditament. The interpretation of these provisions is not easy, but must now be considered in some detail.

The Factory and Workshop Acts, 1901 to 1920

The definitions of "factory" and "workshop" are contained in section 149 of the Factory and Workshop Act, 1901, and in the Sixth Schedule thereto.

The Act divides factories into two categories, textile factories and non-textile factories. Textile factories are premises within which mechanical power is used to work machinery for the manufacture of certain specified textile fibres, including cotton, wool, silk and flax (*o*). Non-textile factories are listed in the Sixth Schedule. In the first part of the Schedule is a list of industrial works which are to be regarded as non-textile factories. The list includes blast furnaces, iron, copper and paper mills, foundries, metal works and glass works (*p*). In the second part of the Schedule there is a list of works which are to be regarded as non-textile factories if mechanical power is there used in aid of the manufacturing process (*q*). This list includes ship-building yards, quarries, bakehouses and laundries (*r*). Section 149 (1) further provides, however, that the expression "non-textile factory shall include premises within which manual labour is exercised by way of trade or for purposes of gain in the making, altering, repairing or finishing of any article or in the adapting for sale of any article."

Workshops also fall into two categories. In the first category are those works which are listed in the second part of the Sixth Schedule, but in which no mechanical power is used. Thus a quarry in which mechanical power is used is a factory, whereas a quarry in which only manual labour is used is a workshop. The second category of workshop comprises any premises, room or place, not being factory in which manual labour is exercised in the same way as in the third class of non-textile factory (*s*).

(*o*) For the full definition, see s. 149 (1).

(*p*) The full list is as follows: Print works: Bleaching and dyeing works: Earthenware works: Lucifer match works: Percussion cap works: Cartridge works: Paper staining works: Fustian-cutting works: Blast furnaces: Copper mills: Iron mills: Foundries: Metal and indiarubber works: Paper mills: Glass works: Tobacco factories: Letter-press printing works: Book-binding works: Flax scutch mills: Electrical stations.

(*q*) s. 149 (1) (b).

(*r*) The full list is as follows: Hat works: Rope works: Bakehouses: Lace warehouses: Ship-building yards: Quarries: Pit-banks: Dry-cleaning and carpet beating works: Bottle-washing works: Laundries.

(*s*) See s. 149 (1).

Despite the complexity of the above provisions, it is not ordinarily unduly difficult to determine whether premises are occupied and used for any of the purposes specifically mentioned in section 149 (1) and in the Sixth Schedule. The principal difficulty has arisen in regard to the interpretation of the residual and general descriptions of factory and workshops and in particular to the interpretation of the phrase " the adapting for sale of any article."

Adapting for sale

The distinction between the adaptation of an article for sale and the mere sorting, storing, cleaning or packing of such an article is a fine one. The question is frequently one of degree and as such a mixed question of fact and law (*t*). The general test to be applied is that stated by Viscount Dunedin in *Grove* v. *Lloyds British Testing Co., Ltd.* [1931] A.C. 446 at p. 467: " I think ' adapting for sale ' points clearly to something being done to the article in question which in some way makes it in itself a little different from what it was before." Thus in *Bristol Co-operative Society, Ltd.* v. *Revenue Officer for Bristol* (1932) R. & I.T. 296 a milk pasteurisation depot was rated as an industrial hereditament upon the basis that milk was there adapted for sale. By contrast it was held in *Wiltshire County Valuation Committee* v. *London Co-operative Society, Ltd.* [1950] 1 All E.R. 937 that the processes of cleaning and cooling milk prior to its dispatch to London was not adapting an article for sale, Lord Goddard C.J. saying, " I cannot see that the mere cooling of the milk turns the milk from one article into another " (*u*).

In *Kaye* v. *Burrows* [1931] A.C. 446, 477 it was held that a rag merchant's warehouse at which rags were ripped, clipped, graded, classified, blended and sorted for subsequent sale to heavy woollen cloth manufacturers was to be rated as an industrial hereditament because the work involved adapting the rags for sale. Viscount Dunedin said: " You must look at what is the finished article to be turned out. If that finished article is only put into the condition of a finished article by the processes to which it has been subjected in the hereditament, then the process will fall within the expression ' altering or adapting for sale ' " (*a*). Premises used for the sorting and arranging of miscellaneous surplus

(*t*) *Cockram* v. *Tropical Preservation Co., Ltd.* [1951] 2 All E.R. 530 at p. 532.

(*u*) At p. 938. The *Wiltshire* case has been distinguished on its facts in the case of brine cooling of milk which has certain effects on the milk. *Express Dairy Co., London, Ltd.* v. *Snell* (V.O.) (1952) 46 R. & I.T. 38, 55.

(*a*) See also *Hines* v. *Eastern Counties Farmers Co-operative Association, Ltd.* [1931] A.C. 446, 477: premises for the preparation of seeds.

ex-service stores were, however, held in *Davis Cohen & Sons* v. *Hall* [1952] 1 All E.R. 157 not to be an industrial hereditament, because there was no adapting of the stores for sale.

An unusual set of facts occurred in *Cockram* v. *Tropical Preservation Co., Ltd.* [1951] 2 All E.R. 520. The premises in question were used for the " packaging " of spare parts for motor-vehicles. The parts were already quite saleable in this country when they arrived at the premises, but the purpose of packaging them was to render them impervious to extremes of humidity and temperature so that they could be shipped and stored abroad for a considerable time without harm or deterioration. It was held by the Court of Appeal that the premises were a workshop, because the process of packaging involved adapting articles for sale. ". . . On the facts . . . the relevant article cannot be regarded as finished or as adapted for sale until it has been subjected to the elaborate processes of preservation and packaging described in the case. On that view of the facts it is reasonably plain that the articles here in question underwent a change. They had been converted from mere loose parts, fit for immediate assembly, into spare parts so treated and packed as to be in a condition fitting them for use as spare parts and to be transported and stored in all sorts of climatic conditions " (*b*).

" *By way of trade or for purposes of gain* "

Large firms quite commonly do not limit themselves to their main activity, but indulge in ancillary activities which would otherwise be the province of independent contractors. Thus a bus company may run its own printing works instead of purchasing tickets from outside firms. It was at one time thought that where the manufactured article was not sold, but used by the manufacturer himself in the conduct of his business, the premises used for the manufacture could not be regarded as a factory or workshop because they were not used " by way of trade or for purposes of gain " (*c*). In *Baily* v. *Stoke-on-Trent Assessment Committee* (1930) 46 T.L.R. 601, however, the Court of Appeal held that where the premises in question fell within one of the specific categories listed in section 149 of the Factory and Workshop Act, 1901, and in the Sixth Schedule, the question of their use by way of trade or for purposes of gain did not arise. It was further held that even where it is necessary to have resort to the residual descriptions

(*b*) *Per* Jenkins L.J. at p. 526: *cf. Richardson* v. *Middlesbrough Assessment Committee* [1947] K.B. 958 (egg-grading centre).

(*c*) *Nash* v. *Hollinshead* [1901] 1 K.B. 700; *Curtis* v. *Skinner* (1906) 95 L.T. 31.

of factory and workshop, premises do not cease to be a factory or workshop because the article there manufactured is not sold. Scrutton L.J. said (*d*) : " I cannot think . . . that where there is manufacture of articles to be employed in carrying on a trade, though that trade is one of supplying services for reward, as carriage by land or water, and not of supplying goods, the manufacture is not for purposes of trade. . . ."

Exclusion from Factory or Workshop of part

Note must be made of section 149 (4) of the Factory and Workshop Act, 1901 (*e*), which provides as follows : " Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop and be regulated accordingly."

This provision has produced a considerable body of case law (*f*) especially with reference to canteens and their kitchens both from the point of view of rating and various aspects of the Factories and Workshops Acts *per se*.

It is submitted that the final view of the courts on this matter is still not clearly expressed. It now seems that neither a canteen nor a canteen kitchen is to be regarded as having such features that they would be a factory or workshop under subsection 1 of section 149 of the 1901 Act, or within the latter part of the subsection.

The question would now seem to turn on whether the canteen and kitchen and similar amenity features are (a) within the curtilage and precincts of a factory or workshop hereditament and (b) solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop. The first point ordinarily causes little if any difficulty. On the present state of the authorities (*g*) if the premises are within (but not otherwise), the test would seem to be whether and to what extent the facilities are provided for and necessary for the welfare and efficiency of the workers in fact engaged in the manufacturing processes on which the factory is engaged.

(*d*) At p. 607

(*e*) Now s. 151 (6) of the Factories Act, 1937.

(*f*) *Thomas* v. *British Thomson-Houston Co., Ltd.* [1953] 1 W.L.R. 67, which refers to and considers aspects of most of the decisions.

(*g*) See the review of such authorities in *Thomas* v. *British Thomson-Houston* (*supra*).

Non-Industrial Purposes

The mere fact that a hereditament is a factory or workshop within the meaning of the definitions and exceptions referred to above, does not, however, mean that it is always entitled to be rated as an industrial hereditament. Section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, contains an important proviso in consequence of which a number of factories and workshops have been held not to be industrial hereditaments. The proviso reads : ". . . the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop, if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—

(a) the purposes of a dwelling-house;
(b) the purposes of a retail shop;
(c) the purposes of a distributive wholesale business;
(d) purposes of storage;
(e) the purposes of a public supply undertaking;
(f) any other purposes, whether or not similar to any of the foregoing which are not those of a factory or workshop."

"*Primarily*"

". . . It was not wished to extend this rating benefit to a hereditament which, although it was called a factory, yet was not primarily, and that is equivalent to "mainly," used for factory purposes. To do so when the factory engaged but a small portion of the hereditament would be to give relief little in keeping with the true industrial tenement sought to be relieved" (*h*). Where therefore a factory or workshop is occupied partly for factory and workshop purposes and partly for other purposes, it is necessary to determine which of the purposes are predominant. If the other purposes are predominant, then the whole hereditament is excluded from the benefits of de-rating. If, however, the factory or workshop purposes are predominant, then the hereditament is entitled to be treated as an industrial hereditament and an apportionment of the net annual value of the hereditament has to be made between the two purposes in accordance with section 4 of the Act of 1928.

Purposes other than those of a factory or workshop

Although the general exception is the last contained in the proviso to section 3 (1) of the Act of 1928, it will be convenient to consider it first.

(*h*) *Per* Viscount Dunedin, *Moon* v. *L. C. C.* [1931] A.C. 151 at p. 166.

In *Moon* v. *L. C. C.* [1931] A.C. 151, the premises under consideration were a printing works occupied by the London County Council and used to manufacture tickets for use on the Council's trams. It was contended for the rating authority that in considering whether premises were occupied for factory purposes, regard should be had not merely to what was done on the premises, but also to the use made of the product manufactured there, and that since the printing of tickets was ancillary to the running of the tramway, the printing works were not occupied for factory purposes. This contention was rejected by the House of Lords, Lord Buckmaster saying: "Throughout the whole statute it is the hereditament that has to be examined. It is the use to which the hereditament is put that determines whether it is a factory or workshop, and it is again the use to which the hereditament is put that determines whether its primary occupation is for other purposes." (*i*). ". . . To bring in the question of whether the product of the factory is for the purpose of being used by something which was not a factory is . . . quite fantastic. Its operation would defeat the whole scheme of the Act . . ." (*k*).

Although regard can only be had to what takes place upon the hereditament, it may well be that the hereditament though a factory, is not occupied primarily for factory purposes. What purposes are factory purposes is to be deduced from the provisions of the Factory and Workshop Act, 1901, but those purposes must all involve the making, altering, repairing, finishing or adapting for sale of articles (*l*). In effect therefore it is always necessary to decide whether the purpose which makes a hereditament a factory is the principal purpose, or merely an ancillary and subordinate purpose (*m*). A good illustration is provided by the case of *Grove* v. *Lloyds British Testing Company, Limited* [1931] A.C. 446, 466. The respondents were the occupiers of premises where marine cables and anchors were tested in accordance with the provisions of the Anchors and Chain Cables Act, 1872. The testing of cables involved the severing of the cables and the forging of new cables. Because the forging was done on the premises, the premises were "metal works" as defined in the Sixth Schedule to the Act of 1901 and accordingly a factory. The purpose of forging was, however, clearly subordinate to that of testing, which the House of Lords held was not a factory purpose, because "testing does not in any way make the article different as an article from

(*i*) At p. 162.
(*k*) *Per* Viscount Dunedin, at p. 167.
(*l*) See s. 149 (1) of the Act of 1901.
(*m*) The same is true of "workshops" and "workshop purposes."

what it was before. It only proclaims its character " (*n*). Therefore the premises were primarily occupied and used for purposes other than those of a factory and could not be rated as an industrial hereditament. " The purpose of a particular factory must be gathered from that which makes it a factory. Here the hereditament is made a factory because of the manufacture of articles of metal. Therefore so far as this hereditament is a factory, its purpose is the manufacture of metal. But the hereditament is, without doubt, primarily occupied and used for the purposes of testing operations, and such operations are, *ex hypothesi*, not factory purposes, consequently the case falls within the words of the exception, and the hereditament, although a factory, is not an industrial hereditament " (*o*).

This being the rule, the question to be decided in each case is whether the primary purpose of the hereditament is a factory or workshop purpose. If it is, the hereditament will necessarily be a factory or workshop. If it is not, it does not matter that the hereditament may, for some incidental reason happen to be a factory or workshop. Thus it is that in a number of the leading cases concerned with the phrase " the adapting for sale of any article," the premises in question happened to be factories and workshops (*p*).

Purposes of a Retail Shop

In general there is little difficulty in deciding whether a hereditament is primarily used " for the purposes of a dwelling-house " and the expression has given rise to no legal difficulties. It has however, been otherwise in the case of retail shops.

The expression " retail shop " is defined by section 3 (4) of the Act of 1928 to include " any premises of a similar character where retail trade or business (including repair work) is carried on."

In *Finn* v. *Kerslake* [1931] A.C. 446, 485 the hereditament consisted of a baker's shop, bakehouse and living accommodation. The bakehouse was a factory and the bread and confectionery baked in it was sold partly through the shop, partly on bakers' rounds and partly to hotels and restaurants. The House of Lords held upon these facts that the hereditament was primarily occupied for the purposes of a retail shop, because the whole trade was

(*n*) *Per* Viscount Dunedin at p. 467.
(*o*) *Per* Viscount Dunedin at p. 469.
(*p*) *Supra*, p. 403. See also *Acton Corporation* v. *West Middlesex Assessment Committee* [1949] 1 All E.R. 409; *Sedgwick* v. *Watney, Combe, Reid and Company, Limited* [1931] A.C. 446.

typical of a baker's retail shop and it was not proper in determining the primary purpose for which the hereditament was used to dissect a unified business. In *Toogood & Sons, Ltd.* v. *Green* [1932] A.C. 663, however, the House of Lords held that a warehouse used for testing and cleaning seeds was not primarily used for the purposes of a retail shop. Seeds prepared at the warehouse were sold both to trade and retail customers. The majority of the retail sales were effected by travellers or by letters addressed to the warehouse or by telephone calls, but there was no accommodation at the warehouse adapted for receiving customers in person or having the physical features of a shop. " . . . The test, as laid down in *Moon* v. *L. C. C.* (*q*) is as to what is done on the hereditament in question, irrespective of what is done outside the hereditament, and, secondly, the test is not whether the hereditament is mainly occupied and used for the purposes of 'a retail business,' but whether it is mainly occupied and used for the purposes of a retail shop " (*r*). The absence from the hereditament of any place having the characteristics of a retail shop prevented the proviso from applying " . . . The true element is in the provision of accommodation in the premises for the public who may resort [there], even if in fact the business is so unsuccessful that the public do not resort " (*s*).

The characteristics of a retail shop were considered in *Turpin* v. *Middlesbrough Assessment Committee* [1931] A.C. 446, 470. A garage was occupied for the purpose of repairing motor-vehicles brought or sent to the premises by customers, for the garaging of cars and for the sale of petrol and oil. Since the statutory definition of " retail shop " specifically refers to " repair work " it was held that the garage was primarily occupied for the purposes of a retail shop. As to the characteristics of a retail shop and of premises to be regarded as similar, Viscount Dunedin said (*t*): ". . . If we compare the hereditament here in question with a retail shop do we find any common characteristics? My Lords, I think we do: for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein."

The general rule therefore appears to be that before a hereditament can be said to be primarily occupied for the purposes of a

(*q*) [1931] A.C. 151.

(*r*) *Per* Lord Thankerton at p. 671. See also on this point *Frawley* (*M. & F.*) v. *Ve-Ri-Best Manufacturing Co.* [1953] 1 Q.B. 318, Jenkins L.J. at p. 318, a decision under the Leasehold Property (Temporary Provisions) Act, 1951, in which rating cases were referred to.

(*s*) *Per* Lord Thankerton at p. 674.

(*t*) At p. 474.

retail shop, there must be some part of the premises to which the members of the public can resort as retail customers. It does not matter that articles produced on the hereditament are all sold in the occupier's retail shops elsewhere (*u*).

It must be appreciated, however, that many hereditaments which would scarcely be recognisable as "retail shops" in any ordinary sense are seemingly caught by this exception (*a*).

Purposes of a Wholesale Distributive Business

By reason of the decision in *Moon* v. *L. C. C.* [1931] A.C. 151 that regard cannot be had to what takes place outside a hereditament in determining the purpose of its occupation, it is not easy to establish that a factory or workshop is primarily used for the purposes of a wholesale distributive business. ". . . The words point at some kind of special use of the premises. In one sense any wholesale business is distributive because no goods remain forever in a factory. They leave the factory in order to be distributed. But without attempting any definition . . . it is easy to conceive premises used primarily for arranging for the process of distribution. . . . In the case of premises where nothing was done except the mere bottling of a liquid, such premises might be said to be of that character" (*b*). Thus in *Lipton, Ltd.* v. *Burton Rating Officer* [1932] 1 K.B. 204, 216, premises were used for blending, cutting, sifting, milling and packing tea, so as to make it suitable for export and wholesale distribution as blended tea, but the tea was not sold upon the premises. In these circumstances the premises were held not to be primarily occupied for the purposes of a wholesale distributive business. Scrutton L.J. saying (*c*): "In the present case the tea blended on the hereditament is sent out to be sold elsewhere. That does not justify the appellant in saying that the primary purpose of the hereditament is distributive wholesale business and that therefore the hereditament is not an industrial hereditament" (*d*).

Purposes of Storage

The fact that a large area of a factory or workshop is used to store materials or goods awaiting the manufacturing process does

(*u*) See also *Wilkinson* v. *Sibley* [1932] 1 K.B. 194.

(*a*) *e.g.*, *Alsford* (J.), *Ltd.* v. *Langridge* (V.O.) (1952) 45 R. & I.T. 201 and *Shuttleworth* (*W.S.*) *Slough, Ltd.* v. *Lane* (V.O.) (1953) 46 R. & I.T. 103. Lands Tribunal decisions.

(*b*) *Sedgwick* v. *Watney, Combe, Reid and Co., Ltd.* [1931] A.C. 446.

(*c*) At p. 222.

(*d*) For other cases in which this contention was unsuccessfully raised see *Weatherhead* v. *Bradford Assessment Committee* [1931] 1 K.B. 385, 465; *Aplin & Barrett* v. *Battersea Revenue Officer* (1931) 14 R. & I.T. 178; *Stepney Revenue Officer* v. *J. Walker & Sons, Ltd.* (1931) 2 Derating Apps. 235.

not mean that the factory or workshop is primarily used for purposes of storage. " . . . Storage in section 3, subsection 1 (d) means storage as a purpose and end in itself, and . . . such storage as is merely a necessary and transitory incident of the manufacturing process which is being carried on does not fall within the definition " (*e*). In *Union Cold Storage Company, Limited* v. *Bancroft* [1931] A.C. 446, 488 it was contended that the refrigeration of meat held in a cold store altered the nature of the meat and so involved an adaptation for sale. Viscount Dunedin rejected the contention saying : " Upon the facts . . . storage is beyond question . . . the primary purpose for which the hereditament is occupied and used, and, though the processes in question, as applied to such goods, may alter them by affecting their quality, and though without their application the goods might not be available for sale in the markets in which they are in fact ultimately sold, yet it is as incidental to storage and to render storage possible and not otherwise that the processes are applied." Contrast may be made with the case of *Kaye* v. *Burrows* [1931] A.C. 446, 477 in which 3,753 square yards out of a total area of 5,774 square yards were used for the storage of rags and yet the primary purpose of the hereditament was held not to be storage. The rags were only stored upon the hereditament prior to, or in the course of treatment, or after treatment and whilst awaiting dispatch.

In *James A. Jobling & Co., Ltd.* v. *Sunderland Assessment Committee* [1944] 1 All E.R. 207 (D.C.) and 500 (C.A.), a separate building occupied by glass manufacturers was used as the dispatch centre for glass manufactured at the nearby factory. Glass awaiting dispatch often remained in the building for as long as six months. It was held that the building was primarily occupied for purposes of storage and dispatch and that therefore the building was not an industrial hereditament.

Purposes of a Public Supply Undertaking

" Public supply undertaking " is defined by section 3 (4) of the Rating and Valuation (Apportionment) Act, 1928, to mean " any undertaking primarily carried on for the supply of gas, water, electricity or by domestic power for public purposes, or to members of the public, or to any one or more undertakings carried on under any special Act or Order having the force of an Act."

The majority of gas works and power stations fall within the

(*e*) *Per* Viscount Dunedin, *Kaye* v. *Barrows* [1931] A.C. 446 at p. 485.

definition and cannot therefore be treated as industrial hereditaments (*f*). Where, however, a power station or generating plant is privately occupied and used for supplying electrical power to a factory, the station or plant will itself be a factory and therefore capable of being an industrial hereditament (*g*).

In *London Passenger Transport Board* v. *Greenwich Borough Council* (1941) 165 L.T. 436, two power stations which were occupied by the Board and which supplied power for the Board's railways, trams and trolleys, were held to be occupied for the purposes of a public supply undertaking. The Board being an undertaking carried on under Act of Parliament. The submission that the proviso did not apply because the Board both generated and consumed the power was rejected. "There is . . . nothing in the definition of 'public supply undertaking' to lead us to suppose that the word 'supply' is confined to cases where the supplier is one person and the person supplied another . . ." (*h*).

Process of Apportionment

If it be decided that a hereditament is an industrial hereditament which is wholly used for industrial purposes, it is to be shown as such in the valuation list (*i*). Where, however, the hereditament is occupied chiefly for an industrial purpose, but partly for a non-industrial purpose, then the net annual value must be apportioned between the two purposes (*k*).

The following rules apply to the apportionment:

(i) The hereditament is to be regarded as occupied for industrial purposes except in so far as any part of it is to be regarded under the provisions already considered as excluded from the mine, factory or workshop.

(ii) If the net annual value of the hereditament does not exceed £50 any non-industrial use is to be disregarded and the hereditament is to be treated as occupied wholly for industrial purposes.

(iii) If less than ten per cent. of the net annual value is attributable to the non-industrial purpose, that purpose is again to be disregarded.

(iv) Where more than ten per cent. of the net annual value is attributable to the non-industrial purpose, the first ten per cent. so attributable is to be discounted (*l*).

(*f*) Premises occupied by the British Electricity Authority and Area Boards are now exempt from rates: Local Government Act, 1948. See *ante*, p. 175.

(*g*) An "electrical station" is a factory: Factory and Workshop Act, 1901, Sixth Schedule, Part I, 20. (*h*) *Per* Wrottesley J.

(*i*) s. 4 (1) of the Rating and Valuation (Apportionment) Act, 1928.

(*k*) *Ibid.* (*l*) s. 4 (2) of the Act of 1928.

The case of the *Ham River Grit Co., Ltd.* v. *Richmond Rating Authority* [1949] 1 All E.R. 286 is illustrative of the first rule. A site was used for quarrying sand and gravel and also as a tip for rubble and rubbish to fill the excavated parts. It was held that the tipping area was an identifiable " place " within section 149 (4) of the Factory and Workshop Act, 1901, solely used for a purpose other than that of the quarry (which was a " workshop ") and that accordingly the net annual value was to be apportioned between the two parts.

The remaining rules can best be illustrated by an example. If the net annual value of an industrial hereditament is £500 and the portion attributable to the non-industrial purpose is less than £50, no final apportionment has to be made. But if the portion is for example £100, then it is necessary to deduct £10 from £100 and add it to the £400, so that the final figures are £410 apportioned to the industrial and £90 to the non-industrial purpose.

B. *Freight-Transport Hereditaments*

There are three types of freight-transport hereditaments :

(1) Hereditaments occupied and used for railway transport purposes.

(2) Hereditaments occupied and used for canal transport purposes.

(3) Hereditaments occupied and used for dock purposes (*m*).

In all three cases it is sufficient if the hereditament is wholly or partly used for transport purposes, but it is necessary that the hereditament should be used for the handling of merchandise (*n*).

(i) *Railway transport hereditaments*

Owing to the fact that railway hereditaments occupied by the British Transport Commission are not liable to be rated (*o*) the provisions of the Rating and Valuation (Apportionment) Act, 1928, which relate to railway transport hereditaments are now of considerably less importance than they were and they need not therefore be considered in great detail.

A railway transport hereditament is a hereditament which is occupied and used either wholly or partly for railway transport purposes as part either of a railway undertaking to which a schedule of standard charges applies (*p*), or of a light railway

(*m*) s. 5 of the Rating and Valuation (Apportionment) Act, 1928.
(*n*) *Ibid.*
(*o*) Local Government Act, 1948, ss. 85 and 86: *ante*, p. 174.
(*p*) The schedule must either have been settled under the Railways Act, 1920, or applied under s. 33 of the Act.

undertaking. In both cases the railway must be used for the conveyance of merchandise (*q*) otherwise than by passenger train or carriage although it is not necessary that the conveyance of merchandise should form a substantial part of the railway's business (*r*). In the case of light railway there is the further express stipulation that it must be a public railway. The term " light railway " is defined to include " a tramroad authorised by any special Act, but does not include any light railway laid wholly or mainly along a public carriageway and used wholly or mainly for the carriage of passengers " (*s*).

The term " railway transport purposes " is also defined to mean " all purposes connected with the conveyance or transport by railway of passengers and their luggage, or of carriages, parcels or merchandise, including the construction, maintenance and repair of all ways, works, machinery and plant used in connection with the undertaking " (*t*). This definition is sufficiently broad to include almost every hereditament forming part of a railway. It is, however, expressly provided that " a hereditament primarily occupied and used as offices for, or for purposes ancillary to, the general direction and management of a railway, canal or dock undertaking " shall be excluded from any freight-transport hereditament (*u*). Such offices may be treated as separate hereditaments though structurally part of a railway station (*a*).

(ii) *Canal Undertakings*

A hereditament which is " occupied and used wholly or partly for canal transport purposes as part of a canal undertaking whereof the canal is used for the conveyance of merchandise " (*b*) is entitled to be rated as a freight-transport hereditament. The phrase " canal undertaking " includes any inland navigation undertaking comprising an inland navigation used to convey merchandise (*c*). The definition of " canal transport purposes " is *mutatis mutandis* the same as that of " railway transport purposes," but it should be noted that any railway occupied as part of a canal undertaking is used for canal and not railway transport purposes (*d*).

(*q*) " Merchandise " has the meaning assigned to it by the Railways Act, 1921.
(*r*) The railway undertaking and the light railway undertaking must also be carried on by a railway company and light railway company respectively, as defined by s. 5 (3) of the Act of 1928.
(*s*) s. 5 (3).
(*t*) s. 5 (2) (a).
(*u*) Proviso to s. 5 (1).
(*a*) *Southern Railway Co.* v. *Railway Assessment Authority* (1935) 22 Ry. & Cass.Tri.Cas 269.
(*b*) s. 5 (1).
(*c*) s. 5 (3).
(*d*) Hereditaments occupied by the British Transport Commission and concerned with the carriage of goods or passengers by inland waterway are exempt from rating: Local Government Act, 1948, ss. 85 and 86: see *ante*, p. 174.

(iii) *Dock undertakings*

Hereditaments which are occupied and used wholly or partly for dock purposes and form part of a dock undertaking (*e*), may be rated as freight-transport hereditaments, provided that a substantial proportion of the volume of business of the undertaking is the shipping and unshipping of merchandise which does not belong to and is not intended for the use of the undertakers (*f*). The effect of this proviso is to exclude private docks which are ancillary to the chief business of the undertakers and which handle only goods needed for or produced by the business.

The word "dock" includes "any harbour, wharf, pier, jetty or other works in or at which vessels can ship or unship merchandise or passengers," but does not include a pier or jetty "primarily used for recreation" (*g*).

"Dock purposes" are widely defined to mean all purposes connected with the shipping or unshipping at a dock of passengers and their luggage, or of carriages, parcels or merchandise. It also includes their transport by any railway forming part of a dock undertaking. As in the case of "railway transport purposes," the construction maintenance and repair of all ways, works, machinery and plant are included, whether used in connection with the undertaking or concerned with the provision of accommodation for vessels, their stores and equipment (*h*).

Finally, it should be noted that a "dock undertaking" means first an undertaking carried on by a dock authority (that is any person or body authorised to construct, or owning or being lessees of a dock, authorised by Act of Parliament). It also includes, however, "any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock" (*i*). It is therefore possible for land not forming part of the dock hereditament itself to be included within the dock undertaking provided that the business purpose for which the land is occupied is connected with the dock and the land is sufficiently near to the dock itself for it to be said that the business is carried on "at" the dock.

Apportionment of freight-transport hereditaments

Where a freight-transport herditament is wholly used for transport purposes, an expression which includes railway and canal

(*e*) For definitions see s. 5 (3).
(*f*) s. 5 (1) (c).
(*g*) s. 5 (3): see for example *Cleethorpes U. D. C.* v. *L. N. E. R.* [1936] 1 K.B. 264.
(*h*) s. 5 (2) (c).
(*i*) s. 5 (3).

transport purposes and dock purposes, there is no need of apportionment. It is, however, provided (*k*) that where a freight-transport hereditament, though wholly used for transport purposes, is used for more than one of the three purposes, the net annual value shall be apportioned to the several purposes.

Where the hereditament is occupied and used partly for transport purposes and partly for other purposes, there must be an apportionment of the net annual value between the two sets of purposes (*l*). A freight-transport hereditament is occupied and used for other purposes in so far as :

(i) it is occupied and used for the purposes of a dwelling-house, hotel or place of public refreshment;

(ii) part of it is let out so as to be capable of separate assessment and is not occupied and used for transport purposes;

(iii) any building, yard or other place comprised in the hereditament is occupied and used for warehousing merchandise not in the course of being transported. (This does not, however, apply to railway transport hereditaments) (*m*).

In *Mersey Docks and Harbour Board* v. *West Derby Assessment Committee* [1932] 1 K.B. 40, consideration was given to the problem of where merchandise ceased to be stored in the course of transport. Scrutton L.J. made the following observations (*n*). " . . . It is clear that Parliament did not intend to give the benefit of de-rating to some kinds of warehouses in docks—namely places ' primarily occupied and used for warehousing merchandise not in the course of being transported,' but did intend to give it to premises connected with the purposes of ' shipping and unshipping.' Whether premises are connected with shipping and unshipping . . . or with warehousing not in the course of transport . . . may vary with the practice in every dock, and the special relations between ship and receiver. Speaking generally, there will be no warehousing not in course of transport until the ship delivers to the receiver. When the shipowner has delivered to the receiver, the receiver may be either sending on from the warehouse at once in a predetermined transport, or he may be waiting and keeping the goods in warehouse, because he does not know where the goods are going to, or to whom he shall sell them. This latter class of warehousing seems to be . . . warehousing merchandise not in course of being transported "; and of bonded warehouses : " Goods are not put into warehouses to stay there for ever. They are put into warehouses to stay till their owner is ready to take them out, because

(*k*) s. 6 (2).
(*l*) s. 6 (1).
(*m*) s. 6 (2).
(*n*) At p. 93.

he has sold them, or determined a destination for them which he did not know when he put them in warehouse. . . . This is especially true of bonded warehouses where the owner of goods leaves them for some time, because, when he takes them out, he will have to pay duty on them. . . . So he warehouses them not in the course of transport " (*o*).

Calculation of Rateable Value

The provisions for the calculation of the rateable value of industrial and freight-transport hereditaments are contained in section 68 of the Local Government Act, 1929.

Where one industrial or freight hereditament is wholly occupied for industrial or transport purposes, the rateable value of the hereditament is one quarter of its net annual value.

Where the net annual value of the hereditament has been apportioned between the industrial or transport purposes and the other purposes, the rateable value is arrived at by adding one quarter of the proportion of the net annual value attributed to the industrial or transport purposes to the whole of the proportion attributable to the other purposes (*p*).

Where an industrial or freight transport hereditament is entitled to the benefit of deductions from the net annual value by virtue of the provisions of Part II of the Second Schedule to the Rating and Valuation Act, 1925, or by virtue of section 64 (1) of that Act (*q*), such deductions are to be made before the hereditament is de-rated.

Where an apportionment of the net annual value has to be made between industrial or freight-transport purposes and other purposes, it would appear that any deduction under the Rating and Valuation Act, 1925, ought to be divided in the same proportions (*r*).

(*o*) See also *Union Cold Storage Co.* v. *Southwark* (1932) 3 Derating Apps. 55.

(*p*) *e.g.*, N. A. V. = £1,000 (industrial purposes £800: other purposes £200) R. V. = $(\frac{£800}{4} + £200) = £400$.

(*q*) *Ante*, p. 398.

(*r*) The Local Government Act, 1929, makes no express provision as to this. See Ryde on *Rating*, 9th ed., p. 351.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Grand Junction Co. v. *Bates* [1954] 3 W.L.R. 45; [1954] 2 All E.R. 385 (Q.B.D.)

Charge by way of legal mortgage—leaseholds—forfeiture of lease whether chargee can apply for relief—Law of Property Act, 1925, *ss.* 87, 146 (4).—In this case the question was whether a chargee by way of legal mortgage of a lease can—as it is conceded a mortgage by demise can—apply for relief, in proceedings to forfeit the head lease, under the Law of Property Act, 1925, s. 146 (4).

Textbook opinions have differed on the point (see [1954] 3 W.L.R. at p. 49; [1954] 2 All E.R. at p. 387). Upjohn J., following dicta in *Re Good's Lease* [1954] 1 W.L.R. 309; [1954] 1 All E.R. 275, held that the Law of Property Act, 1925, s. 87, which gives a chargee by way of legal mortgage all the "protection, powers and remedies" of a mortgage by demise, is not confined to matters between the parties, but extends also to section 146. Therefore the chargee could apply for and, on the facts, was given relief. The learned judge regarded as irrelevant the accepted view that a legal charge is probably not prohibited by a covenant not to assign, underlet or part with possession. He considered the legal charge to be a conveyancing device aimed at simplification, saying, "it would be a pity to introduce subtle differences between one way of creating a charge and another . . . unless the words of the Act so required." ([1954] 1 W.L.R. at p. 51; [1954] 2 All E.R. at p. 388.)

The charge by way of legal mortgage is convenient, and avoids, as the mortgage by demise does not, Maitland's accusation that the English mortgage of land is one long story of *suppressio veri* and *suggestio falsi.* The possibility of unforeseen subtle differences has perhaps been its chief drawback, and therefore the present judicial approach will, it is thought, be generally welcomed.

Davies v. *Hall* [1954] 1 W.L.R. 855; [1954] 2 All E.R. 330 (C.A.)

Settled land—powers of leasing—"best rent"—pleading and onus of proof—Settled Land Act, 1925, *ss.* 13, 42, 110; *Law of Property Act,* 1925, *s.* 152.—If it is proposed to attack a lease which purports to be made under the powers of the Settled Land Act, 1925, on the ground that the best rent is not reserved, the point must

normally be pleaded and the onus of proof will be on the plaintiff. If the lease is impugned on other grounds, the lessee can rely on the Settled Land Act, 1925, s. 110 (1). If, however, the lease is invalid on the face of it—for example, because the term is not one of those permitted by the Act—the lessee cannot be said to be in good faith and so loses the protection of section 110. The dicta of Farwell J. in *Kisch* v. *Hawes Bros., Ltd.* [1953] Ch. 102 are to be limited to the latter point.

In the instant case a tenant for life who never had a vesting deed executed in her favour purported to create a weekly tenancy; the remainderman, succeeding on her death, now sought possession. The county court judge held the lease valid except for the fact that the tenant had not proved the rent to be the best, but the Court of Appeal (Somervell, Birkett and Romer L.JJ.) reversed his decision on the grounds above stated (the point had not been pleaded and was raised only after the evidence had been taken).

Both the Settled Land Act, 1925, s. 13, and the Law of Property Act, 1925, s. 152 (making effective to a certain extent leases purporting to be made under powers), were referred to in this case, but this note is confined to the actual point dealt with in the Court of Appeal. It should be mentioned, however, that Romer L.J. thought that the Settled Land Act, 1925, s. 42 (5), "is a comprehensive code in relation to leases for less than three years with the result that the requirement as to re-entry in regard to longer leases is not introduced into those short leases" ([1954] 1 W.L.R. at p. 860).

British Transport Commission v. *Worcestershire County Council* [1954] 1 W.L.R. 850; [1954] 2 All E.R. 350 (Divisional Ct.)

Public footpaths—existence—declaration by quarter sessions—procedure—National Parks and Access to the Countryside Act, 1949, *ss.* 27–32; *Quarter Sessions Act,* 1849, *s.* 11.—Part IV of the National Parks and Access to the Countryside Act, 1949, requires and enables county councils to prepare a map which will be conclusive evidence of the existence of public footpaths and the like in their area (sections 27–32). A landowner can (*inter alia*—see section 29) ask quarter sessions for a declaration as to the validity and extent of paths shown on the county council's provisional map (section 31). In the present case the parties desired to state a case by consent to the High Court under the Quarter Sessions Act, 1849, s. 11, which avoids the need for an actual hearing and determination of an appeal by quarter sessions. The Divisional Court (Lord Goddard C.J., Hilbery and Donovan JJ.) held that this procedure was inapplicable, because the jurisdiction under the National Parks Act is new and original and not by way of appeal. Lord Goddard C.J. and Hilbery J. added, *obiter,* that after quarter sessions had heard and determined the application no doubt they could state a case in the usual way.

Morelle, Ltd. v. *Waterworth* [1954] 3 W.L.R. 257; [1954] 2 All E.R. 673 (C.A.)

Corporation—mortmain—short lease—foreign company—Mortmain and Charitable Uses Act, 1888, *ss.* 1, 2; *Companies Act,* 1948, *ss.* 14, 407, 408.—The Mortmain and Charitable Uses Act, 1888, ss. 1 and 2, forbids and makes void the holding of land by any corporation in mortmain without licence from the Crown. The Court of Appeal (Singleton, Denning and Morris L.JJ.) held that the Act extends to short leases, distinguishing certain remarks in *Truro Corporation* v. *Rowe* [1901] 2 K.B. 870 and Tudor on *Charities,* 5th ed., p. 415, and agreeing with Halsbury's *Laws of England,* 2nd ed., Vol. 8 at p. 83. It appears that on this point the Act changed the earlier law. Consequently the plaintiffs, a foreign corporation, who had taken an assignment of the 19 years unexpired of a 99-year lease, could not sue sub-lessees for breach of covenant.

The Court of Appeal was at pains to point out that an oversea company can register here under Companies Act, 1948, s. 407, and thereby obtain the benefit of the general permission to hold land conferred by the Act (sections 14, 408). Their lordships were clearly reluctant to accede to any construction of statutes which might make it difficult to enforce against a foreign corporation the obligations affecting landowners in this country.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Thomson v. *Thomson and Whitmee* [1954] 3 W.L.R. 241; [1954] 2 All E.R. 462 (P.D., A.)

Settlement—variation to reduce tax—jurisdiction of Divorce Division—Matrimonial Causes Act, 1950, *s.* 25.—This case, and those discussed in the next two notes, may be described as repercussions of *Chapman* v. *Chapman* [1954] 2 W.L.R. 723 (*ante,* p. 316).

The Matrimonial Causes Act, 1950, s. 25 (replacing earlier enactments), gives the court power, on a decree of divorce or nullity, to vary any ante-nuptial or post-nuptial settlement in the interests of the children of or parties to the marriage, as the court thinks fit. A primary and avowed purpose of the application in the relevant case was the saving of tax. Davies J. confirming the registrar (whose report is printed in the W.L.R. but not in the All E.R.), held that the restrictions placed on the Chancery Division by *Chapman* v. *Chapman* are irrelevant where the Divorce Division is exercising its statutory jurisdiction. He further held that there was no ground of public policy to prevent variations designed to benefit the beneficiaries by saving tax. Consequently four settlements were duly varied.

Apart from the express words of the statute (which are of course decisive) two more general reasons may be urged in support of the distinction between the two jurisdictions. First, the Matrimonial Causes Act only applies to settlements related to marriage, though this is given a wide interpretation (*e.g., Princep* v. *Princep* [1929] P. 225). Even so it is confined, broadly speaking, to settlements of which the fundamental basis has been destroyed. In the circumstances it is hardly possible to insist that the general function of the court should be to enforce the trusts as declared by the settlor (see *Chapman* v. *Chapman* [1954] 2 W.L.R. at pp. 727, 743). Secondly, the Divorce Division varies a settlement once and for all; it cannot review an order in the light of subsequent facts (*Gladstone* v. *Gladstone* (1876) 1 P.D. 442). Consequently there is no danger of an " undignified game of chess " between court and legislature.

Re Harrison's Share under a Settlement; Re Williams' Will Trusts; Re Ropner's Settlement Trusts [1954] 3 W.L.R. 156; [1954] 2 All E.R. 453 (Ch.D.)

Variation of settlements—practice—jurisdiction of judge to review order not entered.—These three applications for approval of schemes to vary family settlements were originally adjourned pending the result of *Chapman* v. *Chapman* in the House of Lords, but were heard and approved in chambers after the decision in *Re Yates Settlement Trusts* [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619 (*ante*, p. 187). However before the orders were entered the decision in *Chapman* was made known and the judge concerned, Roxburgh J., called for further hearing. He now held: (1) the power in the Chancery Division to review in court the decision of a judge in chambers (see Supreme Court of Judicature (Consolidation) Act, 1925, s. 62) is appellate and will not be exercised on the initiative of the appellate tribunal; (2) a judge has a well-established jurisdiction to review any order before (but not after) it is drawn up and entered—citing, *inter alia, Re St. Nazaire Co.* (1879) 12 Ch.D. 88; *Re Suffield and Watts* (1888) 20 Q.B.D. 693; *Preston Banking Co.* v. *William Allsop & Sons* [1895] 1 Ch. 141. (3) Though in all the reported decisions on the point application was made by the parties, a judge himself has both the power and duty to initiate a review if he thinks it proper—the parties cannot prevent this by a conspiracy of silence.

In consequence the three applications were discussed. The particular circumstances may well be unique in the field of conveyancing. It is noticeable, however, that in the earlier cases review was occasioned by matters of fact not law. Whether there is after judgment always a brief *locus poenitentiae* if it is discovered, for example, that a relevant authority has not been considered, is a matter that may need further elucidation. To some extent, of course, parties may have to stand by the case presented to the court, *e.g.*, in matters of pleading.

Re Lord Hylton's Settlement [1954] 1 W.L.R. 1055; [1954] 2 All E.R. 647 (C.A.)

Variation of settlement—compromise of dispute—jurisdiction of Court of Appeal after decision in court of first instance.—In this case the Court of Appeal (Singleton, Jenkins and Hodson L.JJ.) held that despite *Chapman* v. *Chapman* they had jurisdiction to approve a compromise aimed at saving estate duty, even though the judge below (Harman J.) had construed the documents and thereby pronounced on the rights of the parties. Merely the fact of the decision, without reasons, is given in the reports. Counsel is, however, shown to have stressed that the case had occupied a day and a half before Harman J. and that there was a point of substance to be argued on appeal. This lends support to the view put forward in the note on *Chapman* v. *Chapman* (*ante*, p. 316) that a genuine dispute, to found jurisdiction, would be one which would require to be taken to the court whether or not tax was involved. Obviously it would be financially worth while for parties to bring unsubstantial points before the court if this enabled approval to compromises to be obtained. In such cases approval would presumably be refused, or the proceedings might be regarded as an abuse of the process of the court. In a different age there might have developed a new legal fiction, remembering Blackstone's remark that "no fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law" (Commentaries, Book III, Chapter 4, p. 43 (5th ed.).

Re Brace deceased [1954] 1 W.L.R. 955; [1954] 2 All E.R. 354 (Ch.D.)

Condition subsequent — will — construction — whether words precatory.—A testator left his house and possessions to his daughter Irene "on condition that she will always provide a home for my daughter Doris Mary Brace at the above address." For many years Irene had lived with and looked after her father and sister in the former's house. Doris had been mentally afflicted since early childhood and had no means whatsoever.

For a condition subsequent to be valid the court and the parties must be able to see from the beginning, precisely and distinctly, upon the happening of what event the estate is to be defeated (*Clavering* v. *Ellison* (1859) 7 H.L.C. 707; *Clayton* v. *Ramsden* [1943] A.C. 320) but it need not be possible to decide every question with perfect ease (*Re Gape* [1952] Ch. 743; *Bromley* v. *Tryon* [1952] A.C. 265). Applying these somewhat difficult rules in the instant case, Vaisey J. found the expression "provide a home" not merely ambiguous but "quite devoid of any intelligible signification," primarily because the testator had not indicated whether any or what maintenance was to be provided (distinguishing on this ground, and on the presence there of a gift over, *Re Richardson* [1904] 2 Ch.

777). Consequently the learned judge held the phrase as a condition would be void for uncertainty, but that this very uncertainty and the absence of a gift over showed that the words were intended to be precatory and hortatory only.

Two matters were apparently not considered or argued:—

1. The rule that the circumstances surrounding the testator may sometimes be considered if the will is not clear (Theobald on *Wills,* 11th ed., at p. 123). The limits of this rule are not certain, but if applicable it would seem, on the facts stated above, possible to conclude that the testator meant to include maintenance in the word "home."

2. The rule that the court is reluctant to construe a testator's words as a condition if a different meaning can fairly be given to them (Theobald, *supra,* p. 521; for reasons, see *Re Oliver* (1890) 62 L.T. 533). The cases (conveniently set out in Underhill, *Law of Trusts,* 10th ed., at pp. 37–41) show that gifts "on condition" that payments be made or something done have been variously held to create trusts (*Re Frame* [1939] Ch. 700; *Re Young* [1951] Ch. 344), a charge (*Re Oliver, supra*), or a mere personal obligation enforceable in equity (*Re Lester* [1942] Ch. 324). The nearest case to the present appears to be *Re Frame, supra,* where property was bequeathed to A "on condition she adopt B." Adoption was impossible, chiefly because B, aged seventeen, objected. Simonds J. (as he then was) held that there was no condition but a trust; the court could not compel adoption or the personal relationship of parent and child but could, and would, compel maintenance. Admittedly each case depends on the construction of the particular will and furthermore the difficulty of uncertainty on the point of maintenance in the instant case still remains. Nevertheless, *Re Frame* indicates, it is submitted, some readiness in this field to construe generously.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Camille and Henry Dreyfus Foundation, Inc. v. *I. R. C.* [1954] 3 W.L.R. 167; [1954] 2 All E.R. 466 (C.A.)

Recognition of foreign charities as charities in English law.— This case turned on the interpretation of revenue legislation but throws some light on the national character of the English law of charities. Two considerations must be given due weight. Is a foreign institution or object intrinsically charitable in the sense of that word in our law? If so, should it be allowed the important privileges of a charity in England if of no benefit to this country? Both Evershed M.R. and Jenkins L.J. insist that, in answer to the first question, it must be subject to the jurisdiction of our courts and the supervision of our Attorney-General, and must come within the general framework of the English statute of Elizabeth. The

Dreyfus foundation was incorporated in the State of New York. It was conceded that the definition of legal charity in that State was probably identical with our own, but this was irrelevant, as any general ruling would have to provide for Oriental and other charities, possibly of quite a different nature (pp. 173, 191, 199). The Dreyfus foundation carried on its activities solely and exclusively in America. This raised the second question. Must a charity, to be recognised by our courts, benefit the English people? The answer appears to be that it need not, provided it does not actually offend our public policy. A gift to the German Government on trust for disabled German veterans of the 1914–1918 war had been held charitable in *Re Robinson* [1931] 2 Ch. 122. The Court of Appeal in the present case have not wished to be led into any general indications of the demands of our public policy, and whether it is sufficient that the testator show magnanimity in the abstract. The lesson of the vivisection cases suggests that objective public benefit to this country may have to be made out, and not merely the encouragement of private generosity. In *Re Robinson* the testator and funds were English. In *Re Vagliano* [1905] W.N. 179 an English testator validly left funds for charitable objects in Cephalonia—an interesting coincidence, in view of the tragic earthquake which recently occurred in that island and the generous offerings made in England for earthquake relief. It is unlikely that that case would be decided differently today, but the principle is admittedly somewhat nebulous.

(Theobald 334.)

Re White's Will Trusts [1954] 2 All E.R. 620

Lapse of charitable gift—date when practicability decided.—It was conceded in this case that there was no general charitable intention. The testatrix left two cottages to be used as rest homes: a charitable purpose. The cottages were occupied by controlled tenants. Upjohn J. decided that it was not correct to order an inquiry whether the vacation of the cottages would be practicable "at any future time," as this would suspend the gift indefinitely. Both counsel agreed on a slightly more definite formula, whether the achievement of the charitable purpose would take effect or whether there was a reasonable prospect of its taking effect, judged by circumstances at the death of the testatrix. Even this formula is rather vague, as there may be a reasonable prospect of its taking effect after a considerable delay.

(Theobald 357.)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Wilson, Grace v. *Lucas* [1954] 2 W.L.R. 1097; [1954] 1 All E.R. 997

Intestacy—claims of adopted child to succeed—order of foreign court.—Vaisey J. has delivered an important judgment on a much controverted point on which there was no previous English authority. The Adoption Act, 1950, s. 13, provides that an adopted child may succeed its adoptive parent on intestacy if the parent dies after January 1, 1950, after an adoption order. The child in this case was adopted in 1939 by an adoption order made by a Canadian court. The father died in 1953. It was held the child had no rights on his intestacy. The learned judge decided that the law of succession, not that of adoption, governed. The Act of 1950 clearly limited its operation to English and Northern Irish adoption orders. An ancillary order might have been applied for in England, but this was not done, on legal advice that it was unnecessary (pp. 1099, 1104). The fact that the adoption law of the Province of Quebec was similar to our own was not a sufficient ground for extending the rather revolutionary provisions of the 1950 Act. It is interesting to note that authorities on legitimation were considered irrelevant, since adoption is "the creation of a purely artificial relationship, with characteristics which are quite undefined (1103)."

(Theobald 282, 683.)

Re Mitchell, Hatton v. *Jones* [1954] 2 W.L.R. 1114; [1954] 2 All E.R. 246

Bequest on lines of law of intestacy in notional circumstances.—In this case the testator left his residuary estate, on his wife's death without exercising a power of appointment, to the persons who would have been entitled to the wife's estate on her death, had she not been married, under the Administration of Estates Act. This type of formula is often unfortunate in its effects. The wife was illegitimate and was survived by her mother. Her mother's claim was founded on the Legitimacy Act, 1926, and not on the Administration of Estates Act, 1925. Possibly the husband devised this form in order to exclude the mother. In any event it was held that the wife's mother did not take. It was eventually held that the Crown took, as its rights are dealt with in section 46 of the Administration of Estates Act. There was no difficulty in holding that the Crown was a "person" for this purpose.

(Theobald 324, 684.)

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5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Stockbridge Mill Co., Ltd. v. *Central Land Board* [1954] 1 W.L.R 886; [1954] 2 All E.R. 360 (C.A.)

Development value—assessment—evidence.—Held, on case stated by the Lands Tribunal, that the Tribunal should, in determining the development value of particular land, admit evidence of agreed development values for comparable land. The weight to be given to such evidence is a matter for the Tribunal, and the weight they give may not ordinarily be very much.

Lambe v. *Secretary of State for War* (1954) 4 P. & C.R. 230 (L.T.)

Compulsory purchase—measure of compensation— "special purpose."—There has been a lot of litigation, over the years, about the effect of the exclusion (by section 2 rule (3) of the Acquisition of Land Act, 1919), of compensation in respect of "the special suitability or adaptability of the land for any purpose" for which there is no general market. The authorities are confusing enough to justify the raising in the present case of the argument that, in the case of a leasehold interest, the "special suitability" of the leasehold for being merged with the reversion ought to be ignored in assessing compensation. However, the Tribunal turned the argument down.

Watson v. *Secretary for Air* (1954) 4 P. & C.R. 217 (L.T.)

Compulsory purchase—measure of compensation—purchase under Defence Acts.—This case may serve as a reminder, to those who resent having to go back to the Lands Clauses Act, 1845, in compulsory purchase cases, that there are cases in which even the 1845 Act does not apply (although the Acquisition of Land Act, 1919, does): for instance, where the purchase is founded upon the Defence Act, 1842. In general, it will no doubt be possible to show in such cases that the position is much the same as if the 1845 Act did apply—it was possible in the present case, that of a claim by a tenant of agricultural land from year to year. All the more reason, however, for the removal of such anomalies altogether.

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6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Montagu v. *Browning* [1954] 1 W.L.R. 1039; [1954] 2 All E.R. 601

Rent Restrictions Acts—rent in form of services—tenant paying difference between rental value of house and quantified value of services —subsequent increase in wages—rent wholly in form of services— no pecuniary rent paid—application of Acts.—In this case landlords, trustees of a synagogue, let a house to the caretaker of the synagogue on the terms that his wages as caretaker, £40 a year, should be set off against the agreed rental value of the house, £66 a year, and the balance, £26 a year, paid by him as a money rent. Later his wages were increased by £26 a year, with the result that he no longer paid any money rent. The landlords sought to recover possession of the house, and it was argued on their behalf, relying on dicta of Shearman and Salter JJ. in *Hornsby* v. *Maynard* [1925] 1 K.B. 514, that "rent" for the purposes of the Rent Acts means pecuniary rent only, that so long as the tenant paid £26 a year in pecuniary rent he was protected as £26 was more than two-thirds of the rateable value (£34), but that when he ceased to pay any pecuniary rent he lost the protection of the Acts. The Court of Appeal rejected this argument on the ground that no new agreement was made when the wages were increased and pecuniary rent ceased to be paid. They distinguished *Hornsby* v. *Maynard* on the ground that in the present case the services were quantified in terms of money, and expressed doubt about the dicta in that case. Denning L.J. said that rent at common law may consist in services, and that under the Rent Acts so long as the parties have by agreement quantified the value of the services in terms of money the sum so quantified is rent within the meaning of the Acts.

(Megarry, 7th ed., p. 289; Rent Restrictions Guide, 3rd ed., p. 45; Woodfall, 25th ed., p. 330.)

Cairns v. *Piper* [1954] 3 W.L.R. 249; [1954] 2 All E.R. 611

Rent Restrictions Acts — landlord by purchase — purchase of premises subject to tenancy and subtenancy—order for possession against tenant—whether purchaser landlord by purchase of sub-tenant.—The precise point decided in this case is new, but the decision is in line with existing authorities on the meaning of becoming "landlord by purchasing," which excludes the application of para. (h) of the First Schedule to the 1933 Rent Act. The plaintiffs in this case had purchased a dwelling-house which, at the date of purchase, was subject to an existing statutory tenancy of the whole house and a statutory subtenancy of part of the house. The plaintiffs subsequently obtained an order for possession against the statutory tenant of the whole house by offering suitable alternative accommodation. The result of this was that the subtenant became, by virtue of

section 15 (3) of the 1920 Rent Act, the direct tenant of the plaintiffs. The plaintiffs later claimed possession of the part from the former subtenant, relying on paragraph (h) of the 1920 Act. The objection was made that the plaintiffs had become the landlords by purchase and thus could not rely on paragraph (h). The Court of Appeal held that, although the plaintiffs had become the owners of the whole house by purchase, they did not become the landlords of the defendant in respect of the part of the house he occupied by purchase. They became the landlords as far as this part was concerned by virtue of the order made against the tenant of the whole house plus the effect of section 15 (3) of the 1920 Act.
(Megarry, 7th ed., p. 265; Rent Restrictions Guide, 3rd ed., p. 93.)

Cove v. *Flick* [1954] 3 W.L.R. 82n; [1954] 2 All E.R. 441; *S. L. Dando, Ltd.* v. *Hitchcock* [1954] 3 W.L.R. 76; [1954] 2 All E.R. 335

Rent Restrictions Acts—personal occupation—vicarious occupation not enough.—As these two cases raise the same point they will be dealt with together. *Cove* v. *Flick* has in fact only been reported because it is referred to in the judgments in *S. L. Dando, Ltd.* v. *Hitchcock*. The main point in both cases was whether the principle of *Skinner* v. *Geary* [1931] 2 K.B. 546, that personal occupation is essential to entitle a statutory tenant to protection, can be modified by an agreement made with reference to the contractual tenancy out of which the statutory tenancy arises that occupation by someone other than the tenant, *e.g.*, the tenant's manager or his relatives, shall be treated as if it were personal occupation by the tenant himself. The Court of Appeal in both cases refused to accept such a modification. They regarded the decision in *Wabe* v. *Taylor* [1952] 2 Q.B. 735, as confined to the special position of the deserted wife. In both *Cove* v. *Flick* and *S. L. Dando, Ltd.* v. *Hitchcock* reference is made to the statement in Megarry which appears in the following form in the 7th ed., p. 188:—

> "However, it has been held that a landlord may fail to recover possession against a non-resident tenant with no *animus revertendi* if the whole basis of the contractual tenancy out of which the statutory tenancy arose was that the premises should be occupied not by the tenant but by, *e.g.*, his wife or daughters, or the manager of his business. Such decisions present obvious theoretical difficulties, but the satisfactory results can be supported (at all events between the original parties) on the ground that by their agreement the parties have made occupation by the wife or daughters or manager equivalent to personal occupation by the tenant. In such a case a notice to quit apparently suffices if served on the occupier and not on the nominal tenant."

Although Romer L.J. in *Cove* v. *Flick* limits himself to saying that the word "perhaps" before "be supported," which has been dropped from Megarry's 7th edition, should be restored, the result of the two

cases is to indicate that the proposition quoted is untenable. The case of the deserted wife is a special case, and the two county court decisions which Megarry took into account when formulating the above proposition, *Kirk* v. *Shriebhand* [1947] E.G.D. 248, and *Gapps, Ltd.* v. *Hedges* [1950] E.G.D. 255, are to be regarded as disapproved.

(Megarry, 7th ed., p. 188.)

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7. *MISCELLANEOUS*

Logan v. *Logan* [1954] 1 W.L.R. 1050; [1954] 2 All E.R. 619n

In the "Conveyancer's Notebook" (*ante,* p. 102), we dealt with the question of maintenance orders being made for direct payment to children instead of to the mother. In *Logan* v. *Logan,* Collingwood J. held that, where an application for maintenance is made by a wife under the Matrimonial Causes Act, 1950, s. 23, on the ground of the husband's wilful neglect to maintain, the court has no jurisdiction to order the payments to be made direct to the infant child. Section 23 gives the court power to "order the husband to make to her such periodical payments," etc.; section 26 provides that, in any proceedings for divorce, nullity or judicial separation, the court may "make such provision as appears just with respect to the . . . maintenance . . . of the children."

CORRESPONDENCE

To the Editor,
The Conveyancer and Property Lawyer.

Dear Sir,

Provision for the Widow
Non-Appropriation of Annuity—Estate Duty

The above article appeared in *The Conveyancer* (*ante,* p. 7). We act and have acted in many cases where a testator has given an annuity to his widow by his will and the will has contained the usual discretionary power for the trustees to appropriate investments in satisfaction of the annuity and containing directions that, until such appropriation has been made, the annuity shall be paid out of the income of the residuary estate.

In some cases it has not been found convenient or expedient to make such appropriation and during the life of the widow her annuity has been paid out of the income of the residuary estate. On the death of the widow duty has never been claimed by the Estate Duty Office on the grounds that the property was not settled and was therefore not entitled to the exemption afforded by section 5 (2) of the Finance Act, 1894, and section 14 (2) of the Finance Act, 1914.

It did not seem to us that the cases quoted by the learned writer of the article justified the conclusions to which he came. We regard the matter as of great importance as it might seriously affect the rights of the remaindermen on the death of the annuitant on account of the heavy claim for duty

which might arise on the death of the annuitant if no appropriation had been made. We therefore wrote to the Estate Duty Office on the matter. We have heard from them in reply as follows:—

> "I have not seen the article to which you refer, but I can assure you that as the law now stands and on the present official practice, the fact that no fund had been set aside to provide for Mrs. ——'s annuity would not be considered sufficient grounds for refusing on her death the exemption afforded by section 5 (2) of the Finance Act, 1894, and section 14 (a) of the Finance Act, 1914. So far as I am aware no change in the official practice in such cases is in contemplation."

The attitude of the Estate Duty Office must we imagine be of great importance and interest to other members of the profession and having regard to the publicity which has been given to the article by the circulation of your journal, you may think it advisable that similar publicity should be given to the ruling of the Estate Duty Office as set out above.

Yours faithfully,
Lithgow, Pepper & Eldridge

Wimpole Street, London,
April 29, 1954.

To the Editor,
The Conveyancer and Property Lawyer.

Sir,

Assent by Administrator to Himself

In Volume 18 of your Journal on page 215, the opinion was expressed that a statement in an assent by a personal representative to himself as next-of-kin, that he had made no previous assent or conveyance, was of some value, since it may improve the position of a purchaser from him. It is submitted that this proposition is open to doubt.

Section 36 (6) of the Administration of Estates Act, 1925, is divided into three paragraphs of which the first two are material in the present connection. The first of these defines in what circumstances there is "sufficient evidence" that a previous assent or conveyance has not been given. It is quite possible that under this paragraph a statement by an administrator in an assent to himself, to the effect that he has made no previous assent or conveyance, is "sufficient evidence" in favour of a purchaser from him, that this is so. The second paragraph of the section is, however, the material one; for it is the paragraph which makes the exception to the common law rule *nemo dat quod non habet*. It provides that in "a conveyance *by a personal representative* of a legal estate to a purchaser accepted on the faith of *such* a statement" the legal estate shall pass as if no previous assent or conveyance had been made. It is quite clear from this that the first paragraph merely lays down some of the conditions precedent for the operation of the second: the material paragraph. Thus, it is not sufficient to bring a situation within the ambit of the first paragraph only, but it is also necessary to bring it within the ambit of the second paragraph, and the second paragraph requires the conveyance to be by a personal representative. Once a personal representative has assented to himself as beneficiary or trustee, he can no longer convey as personal representative and therefore section 36 (6) of the Administration of Estates Act ceases to be of value on the execution of such an assent. A purchaser from an assentee is therefore unable to derive any protection from the section.

Further, surely this is not a case where the concept of a purchaser for value without notice is of use, as the note would seem to imply. Section 36 (6)

is dealing with a case where a personal representative is purporting to convey something he has not got and the statute in certain circumstances vests the legal estate in a purchaser and removes it from a prior transferee. In other words the statute is concerned with an arbitrary *transfer* of the *legal* estate from one to another, not with the mere destruction of an equitable interest; the former can only be effectuated by statute, the latter by a purchaser for value without notice.

In the light of these considerations, it is submitted that the note is incorrect in suggesting, that a statement to the effect that an administrator has made no previous assent or conveyance, contained in an assent to himself, will improve the position of a purchaser from him.

Yours faithfully,

Birmingham,
July 22, 1954.

G. W. Quance.

LONDON BUILDING ACT, 1939, s. 46

(See article at p. 351, *ante*.)

46. *Rights of owners of adjoining lands where junction line built on*—(1) Where lands of different owners adjoin and at the line of junction the said lands are built on or a boundary wall being a party fence wall or the external wall of a building has been erected the building owner shall have the following rights:—

(a) A right to make good underpin thicken or repair or demolish and rebuild a party structure or party fence wall in any case where such work is necessary on account of defect or want of repair of the party structure or party fence wall;

(b) A right to demolish a timber or other partition which separates buildings belonging to different owners but is not in conformity with the London Building Acts or any by-laws made in pursuance of those Acts and to build instead a party wall in conformity therewith;

(c) A right in relation to a building having rooms or storeys belonging to different owners intermixed to demolish such of those rooms or storeys or any part thereof as are not in conformity with the London Building Acts or any by-laws made in pursuance of those Acts and to rebuild them in conformity therewith;

(d) A right (where buildings are connected by arches or structures over public ways or over passages belonging to other persons) to demolish such of those buildings arches or structures or such parts thereof as are not in conformity with the London Building Acts or any by-laws made in pursuance of those Acts and to rebuild them in conformity therewith;

(e) A right to underpin thicken or raise any party structure or party fence wall permitted by this Act to be underpinned thickened or raised or any external wall built against such a party structure or party fence wall subject to—

(i) making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof; and

(ii) carrying up to such height and in such materials as may be agreed between the building owner and the adjoining owner or in the event of difference determined in the manner provided in this Part of this Act all flues and chimney stacks belonging to the adjoining owner on or against the party structure or external wall;

(f) A right to demolish a party structure which is of insufficient strength or height for the purposes of any intended building of the building

owner and to rebuild it of sufficient strength or height for the said purposes subject to—

(i) making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof; and

(ii) carrying up to such height and in such materials as may be agreed between the building owner and the adjoining owner or in the event of difference determined in the manner provided in this Part of this Act all flues and chimney stacks belonging to the adjoining owner on or against the party structure or external wall;

(g) A right to cut into a party structure subject to making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof;

(h) A right to cut away any footing or any projecting chimney breast jamb or flue or other projection on or over the land of the building owner from a party wall party fence wall external wall or boundary wall in order to erect raise or underpin an external wall against such party wall party fence wall external wall or boundary wall or for any other purpose subject to making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof;

(i) A right to cut away or demolish such parts of any wall or building of an adjoining owner overhanging the land of the building owner as may be necessary to enable a vertical wall to be erected against that wall or building subject to making good any damage occasioned thereby to the wall or building or to the internal finishings and decorations of the adjoining premises;

(j) A right to execute any other necessary works incidental to the connection of a party structure with the premises adjoining it;

(k) A right to raise a party fence wall to raise and use as a party wall a party fence wall or to demolish a party fence wall and rebuild it as a party fence wall or as a party wall.

(2) For the purposes of this section a building or structure which was erected before the commencement of this Act shall be deemed to be in conformity with the London Building Acts and any by-laws made in pursuance of those Acts if it is in conformity with the Acts and any by-laws made in pursuance of the Acts which regulated buildings or structures in London at the date at which it was erected.

(3) Nothing in this section shall authorise the building owner to place special foundations on land of the adjoining owner without his previous consent in writing. [2283]

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